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ABSTRACT

This report of the International Piracy Project addresses three major topics: (1) The Costs and Complications of Piracy; (2) Rights Enforcement Today; and (3) Policy Options for Curbing Piracy. The first section discusses piracy of copyrights, patents, and other intellectual property, including economic losses and damage to the finances and reputation in the communications and information industries, and gives several examples of cases where copyright enforcement is extremely difficult. International systems of protection are described in the second section, including recent U.S. antipiracy laws and private-sector initiatives. A dozen policy options for the public and private sectors to consider are presented in the third section for the Executive Branch, Congress, international organizations, and the private sector. Actions suggested include the following: (1) demonstrate how intellectual property protection benefits developing nations; (2) monitor the effectiveness of U.S. Trade Representative actions; (3) strengthen enforcement of intellectual property rights; (4) establish a presidential commission to analyze U.S. policy and establish mechanisms for implementation; (5) hold congressional oversight hearings; (6) expand criminal penalties for piracy in new media technologies; (7) increase efforts of global organizations and establish worldwide minimum standards; (8) standardize requirements and sanctions for enforcement overseas; (9) expand private international organizations' initiatives; (10) involve local creative industries abroad; (11) set prices at levels affordable for foreign consumers; and (12) establish educational programs. An executive summary and commentaries by the panel are also provided. Relevant materials from the Business Software Association, the International Intellectual Property Alliance, and the Motion Picture Association of America are appended. (MES)

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CURBING INTERNATIONAL

# PIRACY

OF INTELLECTUAL PROPERTY

POLICY OPTIONS FOR A MAJOR EXPORTING COUNTRY

THE REPORT OF THE INTERNATIONAL PIRACY PROJECT

PREPARED BY GARY M. HOFFMAN

THE ANNENBERG WASHINGTON PROGRAM
*Communications Policy Studies*
*Northwestern University*

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THE ANNENBERG
WASHINGTON PROGRAM
*Communications Policy Studies*
*Northwestern University*

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## ABOUT THE ANNENBERG WASHINGTON PROGRAM

The Program, a part of Northwestern University, assesses how communications technologies and current public policies on communications affect aspects of American life, including education, medicine, law, politics, foreign policy and financial markets. The Program also provides a neutral forum, open to diverse opinion, where interested individuals examine whether current policies serve the public interest. Now in its seventh year, the Program is directed by Newton N. Minow, a former chairman of the Federal Communications Commission.

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# EXECUTIVE SUMMARY

Piracy of copyrights, patents and other intellectual property costs the U.S. economy tens of billions of dollars and thousands of lost jobs every year.

The losses of domestic and export sales and royalties, and the damage to finances and reputation, are especially heavy in the communications and information industries, where the products are often nothing more than the intangible intellectual property itself. Movies, computer programs and recordings can be stolen by merely copying, in ways that a shipment of logs or soybeans cannot. Continued losses in the long run undermine the incentive to invest capital in research and the ability to develop new products.

The losses damage some of the country's strongest industries and those with the brightest export potential as our economy specializes in the production of information products and services. For example:

- Pirates issued their own Chinese version of the *Encyclopaedia Britannica* in Taiwan before the legitimate edition could be published, kept selling it despite court rulings and, with classic chutzpah, warned consumers to "watch out for fakes."
- A thousand video parlors in Taiwan–and many more throughout the Third World–show U.S. and other foreign movies without paying public-performance license fees and, in some cases, without even buying the videocassette from its legal distributor.
- Hundreds of thousands of decoders for receiving satellite transmissions of television have been tampered with, allowing people to view and even retransmit Home Box Office (HBO) and similar networks.

The intangible nature of intellectual property has always made it susceptible to piracy, and fast-improving technology for accessing, storing, copying and transmitting information has made theft even easier, cheaper and harder to detect.

Facing the challenge requires hard-nosed pragmatism, not moralizing. Our own country pirated Europe's intellectual property a century ago, when the United States was a young country. New, developing countries have short-term incentives to be "free riders" on the creativity of other nations. Permitting piracy is not, however, in the long-term interest of countries that wish to develop their own economies and innovative potential. Free-riding deprives them of an important incentive for creativity, innovation and entrepreneurship.

As a problem for pragmatic solution, antipiracy efforts are increasingly a part of trade negotiations, both multilateral and bilateral. Multilateral agreements, however, have no enforcement powers and allow countries to protect foreign copyrights and patents to the same extent they protect their own citizens' rights, which is very little in some cases.

Some developing countries have recognized their self-interest in strengthening their intellectual property laws. Hong Kong toughened its intellectual property protection in the early 1980s, increasing prosecution of infringements eightfold in six years. Other countries, however, neglect or reject protection; eight were put on the U.S. Trade Representa-

tive's Priority Watch List this spring.

The Annenberg Washington Program's International Piracy Project, consisting of 23 representatives of industry, government and academia, suggests a dozen policy options for the public and private sectors to consider:

**Executive Branch Actions**

1. Demonstrate and document how intellectual property protection provides economic and cultural benefits for developing countries.
2. Monitor the effectiveness of U.S. Trade Representative actions.
3. Strengthen the enforcement of intellectual property rights abroad and in the United States.
4. Establish a presidential commission to analyze U.S. intellectual property policy and protection and establish mechanisms to implement the policy.

**Congressional Actions**

5. Hold congressional oversight hearings.
6. Expand criminal penalties for piracy in new media technologies.

**International Organization Actions**

7. Increase antipiracy efforts of global organizations, and establish worldwide adequate minimum standards to guide national governments.
8. Standardize evidentiary and proc ural requirements and sanctions for enforcement overseas, and develop an international registry for proof of ownership.

**Private Sector Actions**

9. Expand private international organizations' initiatives against piracy.
10. Involve local creative industries abroad in the antipiracy fight.
11. Set prices at levels affordable by consumers in foreign markets.
12. Establish educational programs for consumers and professionals, here and abroad.

# THE COSTS AND COMPLICATIONS OF PIRACY

Commercial piracy of intellectual property costs the U.S. economy tens of billions of dollars and thousands of lost jobs each year. Particularly hard hit are the communications and information industries. The problem is exacerbated by inadequacies in current international agreements, key foreign countries' reluctance to fight piracy, and the rapid expansion of technologies for accessing, copying and storing intellectual property.

While no one has made a highly reliable estimate of the scope of piracy, it appears to represent a substantial threat to some of the country's fastest growing and most promising industries. An increasing share of U.S. output is in the nature of "informational goods and devices"[1]—precisely the area where creators' and exporters' rights are protected by intellectual property law.

The congressional Office of Technology Assessment (OTA) has estimated that world trade in intellectual property affects more than 2.2 percent of the U.S. labor force and 5 percent of our gross national product.[2] Exports of intellectual property have doubled in recent years and now represent more than 25 percent of U.S. exports.[3] That share would be even greater if it included goods like pharmaceuticals, whose value lies largely in the research and development represented by patents. The potential long-term effects on U.S. trade and welfare are substantial.

We protect copyrights, patents and other forms of intellectual property because, since the early days of the republic, the government has recognized the public interest in granting the inventor, researcher, author, producer or artist some form of exclusive control over the production, sale or distribution of the new product, process or service. This control gives these creative people the incentive to risk investing the time and money necessary to innovate. Their books, films, inventions and other works add to the store of human knowledge and to the quality of our lives.

The arrangement breaks down, however, when "pirates" misappropriate the intellectual property by making, using or selling it for commercial gain without the owner's permission and without paying royalties to compensate the owner.

## LOSSES TO PIRACY

While there are great differences of opinion as to the extent of its damage to the economies of the United States and other developed countries, piracy clearly has a significant impact. It cuts across all types of communications and information industries including broadcasting, movies, publishing, computer software and hardware, and sound recordings.[4]

Part of the problem is defining exactly what falls under the term "piracy." The Annenberg panel settled on: "the unauthorized taking of another person's intellectual property through substantial duplication or production of a substantially similar product or information for commercial purposes."[5] This definition takes in the more damaging forms of piracy and those for which enforcement is most politically acceptable.

Others define piracy more broadly, including

behavior outside the stream of commerce, such as consumers using backyard satellite dishes and unauthorized decoders to view cable television networks, or home computer users making duplicates of software without permission.[6]

A number of U.S. and international bodies have estimated losses to piracy, but the figures are often disputed because they are usually based on corporations' own, unverified estimates. Perhaps the best known of these estimates came out of a U.S. International Trade Commission (ITC) report to the U.S. Trade Representative (U.S.T.R.) in 1988. The ITC estimated that 431 U.S. companies responding to its questionnaire suffered aggregate worldwide losses of more than $23.8 billion in 1986 due to inadequate intellectual property protection.[7] Extrapolating these losses to cover the entire national economy, U.S.T.R. Clayton Yeutter placed all U.S. companies' losses between $43 billion and $61 billion.[8] Some participants in the Annenberg panel, however, questioned the report's methodology and expressed concern that the impressive ITC numbers are unsubstantiated estimates by companies that have an incentive to claim serious damage by piracy.

Many kinds of losses were included in these figures: lost export sales, displacement of U.S. domestic sales by infringing imports, lost fee and royalty payments, reduced profit margins, damage to reputation caused by pirated goods and foregone research opportunities.[9]

Seventy-eight major companies in communications-related industries, surveyed by ITC, incurred some of the heaviest revenue losses:[10]

| INDUSTRY | ESTIMATED LOSS, 1986 |
|---|---|
| Computers and Software | $4,130,000,000 |
| Electronics | 2,288,000,000 |
| Entertainment | 2,060,000,000 |
| Publishing and Printing | 128,000,000 |
| Scientific and Photographic | 5,090,000,000 |

Source: U.S. International Trade Commission, 1988

Piracy also curtails employment in U.S. industries, according to the ITC report. Forty-three respondents to the ITC questionnaire reported that inadequate protection of intellectual property rights resulted in the loss of 5,374 jobs.[11] A 1984 ITC report on the effects of foreign product counterfeiting estimated that 131,000 U.S. jobs in five industrial sectors were lost in 1982 due solely to foreign product counterfeiting and similar unfair trade practices.[12]

*Videocasssette duplicating machines in plant of alleged pirates raided in Manila, Philippines, in 1987. Photo courtesy of MPEAA.*

Other reports have also cited substantial losses to piracy. The International Intellectual Property Alliance, which represents 1,600 companies that produce and export copyrighted products, estimated losses of over $1.3 billion in 1988 in 11 "problem" countries.[13] Piracy losses in those countries totalled $547 million for the U.S. computer software industry, $326 million for the U.S. book publishing industry, $272 million for the U.S. motion picture industry, and $192 million for the U.S. recording industry.

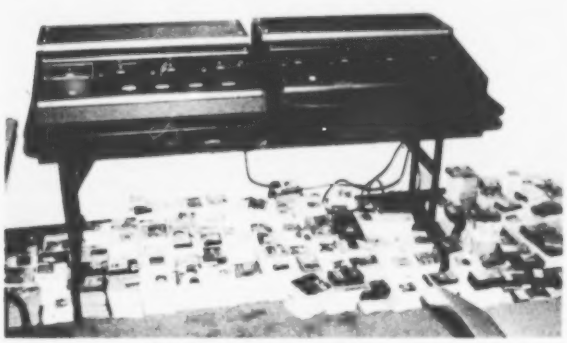
## DAMAGE BEYOND THE CASH REGISTER

Foreign commercial piracy also causes other, often noneconomic harm to the public. Consumers buy pirated goods that tend to be of lower quality than legitimate goods, with little or no warranty protection.[14] In the case of some pirated products, their poor quality can cause personal financial loss, substantial losses in business productivity or data, and even dangers to consumers' health and safety.[15] Bogus amphetamines and tranquilizers have been blamed for deaths and paralysis, and application of a counterfeit fungicide led to the loss of 15 percent of the coffee crop in Kenya, the General Accounting Office has reported.[16]

Finally, many economists and officials of developed countries argue that adequate protection of intellectual property rights is necessary to provide economic incentives for future technological and creative innovation.[17] Without protection, investment in creative activity withers, and the flow of new technology and information to the public dwindles.

## TECHNOLOGY HAS BEEN GOOD TO THE PIRATES

Piracy of many kinds of intellectual property has soared in recent years with the spread of the same electronic technology that makes it easy and inexpensive for consumers and legitimate businesses to get access to, copy, store and transmit data, pictures and sounds. Fiber-optic technology can transfer 100 average-length novels over a distance of 100 miles in one second, for example.[18] Optical disc systems enable users to collect entire libraries in their own homes.[19] The proliferation of video- and audio-taping equipment has undermined the movie and music industries' ability to stop unlawful copying of their productions.[20]



*A relatively small investment (for equipment such as this set-up in a raided California plant) puts a pirate in business. Photo courtesy of Recording Industry Association of America.*

The equipment makes possible black-market industries. Audio pirates in this country use sophisticated machinery to produce cassette tapes virtually indistinguishable from legitimate recordings: label printers print and apply labels directly onto tape shells, hydraulic machines load blank tape into the cassette shells, duplicating machines record several blanks simultaneously from a master at 64 times the playback speed, and other machines finish the packages in shrink-wrap. Similarly, personal computers enable operators to make exact replicas of computer software in the privacy of their homes or offices, or enable them to access, retrieve, copy, and store information from someone else's computer, often without their knowledge or consent.[21] Before xerography, good copies of text were available only by printing. Before compact discs and digital audiotape, high-quality copies of music were available only through very expensive analog tape systems or record pressing. Now an unprincipled entrepreneur can go into the piracy business for a relatively small capital investment.

These advances hamper the enforcement of antipiracy laws and far outpace governments' ability to respond. As OTA has noted, these technologies are making traditional civil suits largely ineffective as a means of enforcing intellectual property rights.[22] Unlike traditional publishing and broadcasting, computer networks and personal computer use are highly decentralized and virtually impossible to monitor, as is access to satellite transmissions.[23] To a great extent, many rights holders have no way of knowing when their rights are being infringed and royalties are due to them.

New technologies often do not neatly fit into existing types of intellectual property protection, particularly copyright law.[24] As a result, rules to determine royalties in various media have developed separately. For example, the United States, Japan and Sweden now protect semiconductor design with legislation drawn up specifically for that technology.[25] Biotechnology is gaining patent protection in the United States, but many countries have not yet extended similar protection.[26] When cable television systems began to retransmit "distant signals" from out-of-town TV stations, Congress responded by requiring the systems to pay royalties to program copyright owners under a compulsory license.[27] As communications networks begin to interconnect different media, the old rules begin to break down, leaving copyright protection partial and often uncertain.[28]

Copyright has traditionally protected the way an idea is expressed, rather than the idea or information itself.[29] In the area of computer software, copyrighting a program may leave it unprotected because a competitor can often skirt the law, altering the originator's expression of the program slightly while maintaining its substance.[30]

Despite the passage of laws, however, the broad diffusion of video, recording and computer technology has made copyright enforcement extremely difficult. Two examples:

### CASE STUDY IN HIGH-TECH PIRACY I: SUBSCRIBER TELS LOST IN SPACE

Tampering is believed to have compromised perhaps 400,000 of the decoders designed to allow cable tele-

vision networks to charge subscription fees to viewers with their own home satellite dishes. That is, more than a quarter of the decoders ever built are being used illegally.[31] These altered decoders, half of them outside of the United States, allow a viewer to receive HBO and other cable channels without paying subscription fees. General Instrument Corporation, manufacturer of the VideoCipher decoder, is attempting to identify the illegally modified decoders and render them inoperable through a program of ongoing electronic countermeasures.

In addition, of more than 540,000 VideoCiphers authorized for service, an undetermined number are illegally receiving programs outside of the country simply because the subscriber can obtain authorization by providing a false U.S. mailing address. Through reports from the field, HBO has identified unit address numbers of nonmodified VideoCiphers being used in Canada, Mexico, the Caribbean and South America. For example, in the Canadian town of Dawson, Yukon Territory, a consumer VideoCipher registered to a subscriber who used a post office box in Alaska was decoding and providing the HBO signal for all residents of the town.

### CASE STUDY IN HIGH-TECH PIRACY II: TAIWAN'S 1,000 VIDEO PARLORS

In such numbers that they are nearly impossible to monitor, pirates throughout the developing world are setting up their own miniature movie houses using ordinary videocassette machines. Taiwan has more than 1,000 "MTV parlors," as they are known locally, that screen movies for audiences as small as two or three.[32]

Often the movie distributors are hit by a double whammy: The proprietors not only fail to obtain licenses for public performance of the films, but also show the movies from cassettes that, nine times out of ten, are pirated copies.

The Motion Picture Export Association of America filed a test case on the "public performance" issue in February 1988 against the "Crow's Nest" MTV center in the capital city of Taipei to test the public performance standards of Taiwan's copyright protection. The judge ruled firmly that the video parlor's owner was involved in "illegal leasing" of both legitimate and counterfeit tapes, but he side-stepped the "public performance" issue. The full order of the High Court, issued in January 1989, noted that public performance was not at issue. That decision has been appealed to Taiwan's Supreme Court.

The motion picture industry has taken its fight to administrative authorities as well. Since a 1988 fire at one MTV parlor in Taipei, the government has stepped up enforcement of facility standards and licensing laws, shutting down many of the parlors temporarily, and has pledged that the licensing will enable authorities to better monitor copyright infringements. However, bureaucratic delays, indecision and outright opposition have plagued antipiracy efforts.

The industry, meanwhile, has pressed its case in Washington, outlining the MTV-parlor problem in a lengthy filing with the U.S. Trade Representative and testifying in Senate hearings.

## SOME NATIONS PROTECT AND SOME DO NOT

Though piracy occurs in every country, it is most concentrated in nations like Taiwan—developing countries with active commercial sectors. Sales figures show, for instance, that, though Taiwan has almost as many personal computers as various European countries, Taiwanese acquisition of software through legitimate channels lags far behind Europeans'.[33] Though the country amended its copyright law in 1985 to cover software, it does not protect translation rights, which leaves U.S. software publishers without recourse against unauthorized translations of user manuals.[34] Furthermore, Taiwan's interior ministry had investigated only 16 cases of software piracy, and only 49 infringing works had been seized, through the third quarter of 1988.[35]

When the Business Software Association (BSA), made up of six major U.S. software manufacturers, petitioned the U.S.T.R. to investigate six countries and designate them as "priority foreign countries,"[36] five of the six were developing countries: Taiwan, Mexico, Brazil, Thailand and the People's Republic of China. (Italy, the lone developed country on the list, has five pirated copies of software for every one purchased legitimately, BSA estimated.[37] BSA's white paper on software trade appears in the Appendix.)

The incidence of piracy varies greatly, depending on laws, their enforcement and other factors. Audio tape piracy, for instance, was estimated to take more

than 80 percent of the market in 1986 in Portugal, Ghana, Nigeria, Saudi Arabia, India, Pakistan, Thailand, and 15 percent or less in Brazil, Chile, the United States, France and West Germany.[38]

## CASE STUDY IN LAX ENFORCEMENT: ENCYCLOPEDIA PIRACY IN TAIWAN

Even in countries that have antipiracy laws, a permissive tradition can allow piracy to thrive. The publishing scene in Taiwan is a case in point. In 1985, the republic amended its copyright law, broadening protection. It also issued administrative rulings and accorded the same treatment to U.S. copyright holders that domestic holders receive (so-called "national treatment"). The country has since continued to make further progress towards a bilateral agreement on copyright matters with the United States. However, enforcement problems persist.

The recent piracy of *Encyclopaedia Britannica* in Taiwan illustrates this point.[39] After the opening of mainland China, Encyclopaedia Britannica, Inc., publisher of the oldest continuously issued encyclopedia, arranged with a mainland publishing house to produce the 12-volume short-entry portion of the English language *Britannica*, known as the *Micropaedia*, in the now-official simplified Chinese characters. The massive project was completed in 1986 when the 10-volume *Concise Encyclopaedia Britannica (CEB)* was published on the mainland.

In the fall of 1987, Encyclopaedia Britannica entered into an agreement with a Taiwan publisher, Chung Hwa Book Company, Ltd., to put out a Taiwan edition of the *CEB*, using the traditional Chinese characters read in Taiwan. The first volume of the authorized Taiwan edition was to be published by Chung Hwa in March 1988 and the last in late 1989. Before the first volume of the authorized set could be issued, however, another publisher, the Tan Ching Book Company, rushed out an unauthorized edition and sold it at a price substantially lower than that planned for the authorized edition—no small wonder, given the lack of editorial development costs.

Two Taipei city orders were issued for detainment of certain volumes of the unauthorized set in 1987 and 1988, but both were based on easily circumvented infractions of local publication laws and were totally ineffective in stopping Tan Ching. Responding to complaints from the legitimate licensee and distributor, Taipei police raided the pirate's printing

*Some of the 1,000 unauthorized* Encyclopaedia Britannica *volumes seized in raid at a book bindery outside Taipei, Taiwan. Photo courtesy of Encyclopaedia Britannica, Inc.*

operation in February 1988, confiscating more than 56,000 covers and numerous volumes. In a criminal case that fall, a judge convicted two Tan Ching principals and sentenced them to a year in jail. The judge found:

> *"The defendants are engaged in publication of books. However, instead of carrying out their business legally, they pirated the works of foreigners. By doing so, they greatly damaged the R.O.C.'s reputation in protecting the copyrights and the interests of foreign companies. After search and seizure of the pirated copies by the police, the defendants moved to another place and hired other people to publish the pirated copies.*
>
> *Furthermore, they even openly advertised in the newspapers to solicit customers. The defendants' activities are an extreme violation of the law. Additionally, during the investigation they repeatedly made unreasonable arguments without showing any sign of remorse."*

Rather than ceasing its piracy, Tan Ching was soon back on the streets with fliers that attempted to capitalize on the development: "To minimize our losses as a result of the unfavorable ruling . . . we will, beginning today, sell at a super low price our *Encyclopaedia Britannica*."

Notwithstanding four more police raids in 1989, Tan Ching continued to sell many of the encyclopedias, using many small printing companies, appealing court rulings and exploiting the possibilities for delay within the Taiwan court system to keep a monopoly on the books.

Stalling a criminal trial, Tan Ching filed a civil declaratory action alleging that Encyclopaedia Britannica, Inc. did not possess the *CEB* copyright,

resulting in relitigation of the same issues previously decided by the criminal tribunal of the same court. The civil tribunal in May 1989 in effect refused to recognize the legitimate publisher's copyright on the *CEB*, dismissing the evidentiary value of a U.S. copyright certificate in a Taiwanese court. Although the court stated that the Friendship, Commerce and Navigation Treaties between the United States and Taiwan would be applied in this case, it unfortunately concluded that the copyright clause found in Article IX of that Treaty is not self-executing, and, hence, may not be enforced by any Taiwan courts in the absence of new legislation.[40]

Ironically, Tan Ching's latest promotional piece warns: "Please watch out for the fakes that have lately appeared in the market. Always look for the right trademarks and compare quality to avoid being cheated."

### SELF-INTEREST PROMPTS ACTION IN HONG KONG

In contrast to Taiwan and similar piracy trouble spots, other developing countries have significantly strengthened their enforcement; Hong Kong, for example, has greatly reduced its outflow of pirated products, covering its enforcement costs with fines. How did Hong Kong make such a radical turnaround from international piracy capital to safe business harbor?

The colony's government and business community understood the linkage between piracy and their own straightforward mercantile motivations. International trade is the mainstay of Hong Kong's economy. Regaining international goodwill became paramount, if Hong Kong was to establish itself as a bastion for business. The Trade Description Ordinance, effective in 1981, specifically prohibits false trade descriptions, false markings and any misstatements in respect to goods in the course of trade. Its criminal sanctions and strong enforcement and control provisions made the ordinance effective. Hong Kong customs officers are empowered without a search warrant to seize anything or detain anyone suspected of violating the law. Copyright protection is also provided under the United Kingdom Copyright Act of 1956 as extended to Hong Kong in 1983. Equally important, the Customs and Excise Department in Hong Kong was given a substantial budget and staff (140 people) to get the job done.

Statistics demonstrate the turnaround in Hong Kong's antipiracy war. In 1978, the government embarked on 213 investigations into counterfeiting and prosecuted 56 individuals. By 1984, the number of investigations had grown to 865 and prosecutions to 432. The vigilance continues today: there are fewer reports of piracy, and those that occur are typically dealt with strongly.

## WHO BENEFITS FROM PROTECTION OF INTELLECTUAL PROPERTY?

The conventional answer to the question in many quarters was endorsed in the early 1970s by such economists as Raul Prebisch, who concluded that developing nations weaken their economies by strengthening their protection of intellectual property.[41]

However, economic theory on intellectual property protection in developing nations has been described as being "in a state of flux" today.[42] Other economists have found that increased intellectual property protection enhances rather than deters economic development in less-developed countries.

The question for these countries is not whether access to intellectual property is necessary for rapid and sustainable economic development. History demonstrates that it is. Increased productivity, largely based on the application of intellectual property, recently has accounted for three-quarters or more of recorded economic growth worldwide.

Rather, the key questions are how developing countries can encourage the reliable, long-term transfer of useful technology and knowledge, and obtain state-of-the-art products and services, from the developed world.

Developing countries have strong incentives to choose what appear to be "free rides," using knowledge developed elsewhere without paying for it. But intellectual property of any kind is not free, appearances to the contrary notwithstanding.

It is generally recognized that economic development requires "money capital." Countries and other economic communities must forego immediate benefits and save up by investing in capital goods that will enhance their future production and income. Encouraging the development of intellectual property and protecting against its unauthorized use can and should be regarded as investment in "knowl-

edge capital"–the information-producing and sharing activities that pay off with indigenous economic and cultural development.

Failure to invest in "knowledge capital" fosters the same kind of dependency on the outside world as failure to accumulate other forms of productive capital. Economic development ultimately depends on the assimilation and adoption of technologies developed at home and abroad. Without protecting intellectual property, governments assure that their domestic economy and culture will remain second class, isolated from full participation in the world economy and dependent on the intellectual wealth of more technologically advanced countries.

In Brazil, for example, the pharmaceutical industry does not really exist outside of mixing and packaging facilities, because the country's laws do not respect drug patents. In India, pharmaceutical research and development is largely directed to circumventing U.S. process patents by developing alternative manufacturing processes (though the alternatives are generally less efficient than the patented processes); in other words, it is occupied trying to beat the system rather than improve the drugs or manufacturing processes. This is unfortunate, because both India and Brazil have excellent potential for research and development–particularly India, in the area of computer software.

The apparent advantages of "free riding" are more illusory than real. As is the case with deficit spending by central governments, most of the benefits accrue in the short run while most of the costs are deferred to future generations in the form of lower real incomes and standards of living. By failing to develop their own domestic knowledge-producing capabilities, these countries saddle their future generations with lower quality and less diverse goods, inflated prices and lower labor productivity and competence.

Although long-term economic development effects of adopting a regime of intellectual property protection are, on balance, quite advantageous, questions have been raised about the short-term impacts.[43] Cracking down on "free riding" has an immediate negative effect, almost by definition, with the closing of previously lawful business endeavors.

Annenberg panel members discussed at length whether there is a delay between a country's implementation of intellectual property protection and the day it receives its first net benefits.

Economic activity need not decline after intellectual property reform, even in the short run, if the marketplace fully and correctly anticipates the institution of property rights. In time, the market creates new or similar legal jobs for workers displaced in pirate industries. The period of adjustment varies from case to case, depending on, among other things, the efficacy of government programs to ease the transition to the new environment. At worst, the economy incurs short-run costs as a means of increasing the living standard over the long run. That situation, of course, is characteristic of all economic development programs.

Singapore adopted effective intellectual property reform without an economic downturn. The movie and music industries both have legitimate and healthy presences in that country; computer companies there offer a full array of hardware, software and support. Countries such as Taiwan and Korea have adopted stronger laws but have not yet backed them up with effective enforcement.

Developing countries, eager for economic development, fear that protecting imported intellectual property will leave them at a permanent disadvantage, facing prohibitively high prices for the technologies and creative works they need to modernize.[44]

Contrary to this assumption, however, prices are not automatically higher where intellectual property is protected. In some situations, protection affects the market share of competing companies more than prices for needed information or products. For instance, in countries that have added pharmaceutical patent protection, Italy, West Germany and Canada, prices have not significantly increased. In Canada, pharmaceutical prices actually *decreased* when the country reinstated lapsed patent protection, bringing new, legitimate competition into the market.

There is, in any case, no guarantee that piracy will keep prices down. Where it is permitted, pirates don't sell at a price lower than they can get; indeed, where the lack of intellectual property protection keeps legitimate companies out of the market, pirates may charge monopoly prices. Likewise, in markets where intellectual property is protected, competition keeps legitimate sellers from taking advantage of their protected status: they cannot charge more than the market will bear without losing sales, because almost all products have substitutes. Any abuses in pricing are best addressed through pro-competition laws that enable a country

to remedy them, case by case. If prices do increase, that is society's cost of rewarding risk-taking innovators.

By allowing technological piracy, developing countries do not provide the incentives for indigenous innovation but rather stifle it and foster the "brain drain" of their most able innovators. India's lax intellectual property protection, for instance, constitutes a disincentive for computer programmers to stay and work in their home country.

Illegal transfers of technology through piracy are not accompanied by the transfer of training experience and knowledge that comes with legitimate transfers of technology.[45] If the developing nations are patient, the long-term social benefits of intellectual property protection–increased flow of ideas, information and technology into the developing country, development of human capital, development of indigenous innovation, increased rates of economic development and other economic benefits–will easily surpass the short-term costs of complying with international intellectual property protections.[46]

Certainly the developing world is not unanimous in opposition to intellectual property laws. For example, the Korean Publishers Association has reportedly split over the foreign copyright issue. Korean publishers of primarily domestic works seek to put pirates out of business to deter unfair competition, while the pirates themselves wish to continue to pirate works in English and Korean.[47]

Janet H. MacLaughlin, now a Washington-based economist with the Boston law firm of Putnam, Hayes & Bartlett, in the most comprehensive study of the economic effects of intellectual property protection in developing nations, found that the long-term benefits of intellectual property protection appear to outweigh any short-term economic dislocation that would result from enacting full protection for most nations, regardless of their current levels of piracy.[48] MacLaughlin identified such short-term losses as dislocation of piracy-based industries through termination of sales or payment of royalties.[49] The study found, however, that the country would also have these long-term benefits: (1) increased technology transfers both across and within borders, (2) creation of an infrastructure that promotes innovative activity and (3) increased investment from abroad.[50]

MacLaughlin projected the GNP growth needed to offset the loss of short-term benefits if all piracy were eliminated for seven countries–Argentina, Brazil, India, Mexico, Republic of Korea, Singapore and Taiwan–and found that the worst-case scenario required only a 0.6 percent increase. In view of the long-term benefits of full intellectual property protection, the report concluded that modest additional growth was "attainable." The report noted that Taiwan, which recently instituted full intellectual property protection, experienced no discernible short-term negative impact on its GNP.[51]

## INTERNATIONAL SYSTEMS OF PROTECTION

As U.S. companies trading in intellectual property have sought to increase their presence abroad, international protection of intellectual property rights has become increasingly important.[52] The current international system of protection, however, has been heavily criticized as inadequate.[53] The system's major components are the World Intellectual Property Organization (WIPO), the Berne Convention and Universal Copyright Convention copyright agreements and the Paris Convention patent agreement.[54]

These organizations and agreements have serious shortcomings. The treaties were not intended to and do not provide for powers to enforce intellectual property rights or means to settle disputes. Furthermore, too few countries–particularly developing countries–participate in any single agreement that significantly affects commercial piracy.

No single existing international agreement provides a uniform set of intellectual property rules or protection measures. The agreements require only that the parties provide "national treatment": each participating country protects intellectual property rights of other participating countries to the same degree it protects those of domestic rights holders.[55] Accordingly, the level of intellectual property enforcement varies widely from country to country.

Furthermore, developing countries' influence on international intellectual property organizations tends to limit the organizations' effectiveness in developing and enforcing extensive international protection for intellectual property. Because many Third World governments believe that the costs of intellectual property protection outweigh its benefits,[56] they have balked at updating the agreements and increasing or expanding intellectual property protection through international multilateral agreements.[57] The international organizations must accommodate these views because the developing countries' participation is vital.

Finally, the United States' refusal to join the Berne Convention until 1988 weakened our influence on international intellectual property organizations.[58] Many countries resented the United States for refusing to join Berne because it enjoyed Berne protection without offering reciprocal protection to Berne members.[59] U.S. demands for increased copyright and patent protection were not credible to these countries.[60] This problem is moot, however, because the United States has since joined the Berne Convention.

The conflict of views between many developing nations and the industrialized nations remains a major obstacle to consistent international protection of U.S. intellectual property rights.

## RECENT U.S. ANTIPIRACY LAWS

In recent years, the U.S. government has begun treating intellectual property protection as a pragmatic trade and customs issue rather than a moral ques-

tion. After all, the acceptability of using another person's creations varies from country to country and era to era. Americans were once notorious pirates of books published in Britain. It is significant that the addition of intellectual property protection to the agenda of trade diplomacy has been accepted by the international community.

The link between intellectual property and trade was pioneered in the Caribbean Basin Initiative, which preconditioned trade benefits on protection of satellite-transmitted television signals in the islands.[61] Trade and intellectual property have become so intertwined that intellectual property protection was placed on the agenda of the latest round of General Agreement on Tariffs and Trade (GATT) negotiations.

Congress has responded to piracy with a series of laws. The Trade and Tariff Act of 1984 authorizes the President to impose import restrictions on goods from countries that do not adequately protect intellectual property rights. The Caribbean Basin Economic Recovery Act of 1984, Public Law Number 98-67, requires the President to evaluate Caribbean countries' protection of intellectual property rights before awarding them tariff preferences. The Computer Software Protection Act and the extension of the Generalized System of Preferences protect U.S. intellectual property rights. The Trademark Anti-Counterfeiting Act of 1984 increases plaintiffs' protection and remedies in civil suits against international counterfeiting. The Semiconductor Chip Protection Act of 1984 gives the creator of a semiconductor "mask work" control of reproduction, importation, distribution and sale for ten years[62]—a media-specific approach to protecting a new information technology.

A more recent law with antipiracy provisions, the 1988 Trade Act, expands intellectual property rights in a number of areas. It simplifies patent infringement proceedings under Section 337 of the Tariff Act of 1930 before the ITC. It provides patent owners a new cause of action for infringement of a U.S. process patent by foreign manufacturers exporting to the United States. The law also authorizes sanctions against countries denying market access to U.S. industries that depend on intellectual property protections.[63]

Although many provisions of the Trade Act and other legislation are designed to prevent piracy of goods for export to the United States, the preferable approach to combatting piracy in foreign countries is to persuade the countries to protect intellectual property themselves.[64] In this effort, the United States can choose among a range of procedures of varying strength, including economic arguments, trade pressure, provision of direct benefits, bilateral treaties and multilateral treaties, including GATT.

Perhaps the most prominent of the 1988 Trade Act provisions is the "Special 301" procedure: the U.S.T.R. is required to analyze foreign countries' intellectual property laws and initiate accelerated investigations of countries that deny "adequate and effective" protection of intellectual property rights, including patents, copyrights, trademarks and mask works.

The threat of a six-month "priority country" investigation and possible trade sanctions may be all that is needed in some cases. U.S.T.R. Carla Hills announced in May 1989 that she would not name any "priority countries" under the law since all of the major prospects were sitting down for negotiations. Instead, she put eight countries on a "Priority Watch List": Brazil, India, Mexico, the People's Republic of China, South Korea, Saudi Arabia, Taiwan and Thailand. Seventeen others with lesser piracy problems were put on a "Watch List."[65]

Threatening trade sanctions is a strong tool in dealing with some countries, but is ineffective with others. There appears to be a direct relation between a developing country's reliance upon exports to the United States and the country's willingness to improve its intellectual property protection. Specifically, Korea, Singapore and Taiwan have recently shown improvement in establishing protection of intellectual property, while Argentina, Brazil and India showed no improvement and Mexico showed "some" improvement.[66]

In countries that lag behind, U.S. companies could try a private-sector initiative. Though the U.S. government has not favored the concession of direct benefits, one commentator has proposed that multinational corporations agree to invest in these countries in exchange for intellectual property reforms.[67] The program could be conducted under the auspices of the U.S. government.

Though trade agreements and other governmental answers to piracy are often effective, the leverage has its cost: they often require trade-offs, including incentives offered to the foreign countries.

Bilateral negotiations also create discontinuities in

U.S. foreign relations, causing one country to demand the same concessions granted to another. Further, because the bilateral treaty may provide intellectual property protection to all foreign property owners–not just U.S. property owners–other developed countries may receive a "free ride" by taking advantage of a developing country's reforms without having to match U.S. concessions.[68] In addition, bilateral negotiations may be ineffective where the U.S. bargaining position is weakened by lack of lawful trade or U.S. government aid.[69]

Problems with bilateral negotiations have increasingly led the United States to attempt intellectual property reform through multilateral treaties, particularly the GATT.[70] Inclusion of intellectual property reform on the agenda of the Uruguay GATT negotiations was a major victory for advocates of reform. U.S. industry groups prepared a set of "minimum standards" for patents, copyrights, trademarks, trade secrets and semiconductor chip design[71] that they hoped to include in GATT. The Americans' preparations notwithstanding, several developing countries such as India and Brazil are vigorously opposing intellectual property reforms in GATT because their current practices fall far below the minimum standards proposed by the United States.[72]

## PRIVATE-SECTOR INITIATIVES

Educational efforts to acquaint the public-at-large with the economic damage and the moral "wrong" of intellectual property piracy are one approach to combatting the problem. Individual companies and trade organizations are committing their dollars to public education rather than litigation, as demonstrated by the "Thou Shalt Not Dupe" campaign organized by the Computer Software and Services Industry Association (ADAPSO).[73]

Public concern about piracy *can* be aroused in developing countries. Public and political backlash in Indonesia after the pirating of the *Live Aid* famine relief telecast resulted in the country's first significant revision of intellectual property law,[74] but this may be an isolated incident because the "taking" was from a charity rather than a commercial venture.

Lobbying of state governments is another means of combatting piracy. Some 50 software manufacturers, for example, have committed $500,000 for lobbying purposes to their Software Protection Fund. Industry groups have lobbied states to upgrade piracy of sound recordings (and related consumer protection laws) from misdemeanors to felonies; California, Texas and five other states have passed such laws, with sentences of up to five years in prison and $250,000 in fines.[75]

Individual U.S. companies also can negotiate royalties from foreign infringers if the companies have sufficient leverage.[76] Further, U.S. companies may lure foreign pirates into the United States in "sting" operations, thereby making the pirates subject to U.S. intellectual property law.[77]

# POLICY OPTIONS FOR CURBING PIRACY

In the fall of 1988, The Annenberg Washington Program selected a diverse group of 23 specialists from industry, government and academia to address the piracy problem and propose remedies. After a series of all-day meetings, the panel proposed the following dozen options.

Though implementing any or all of these options would help curb piracy, the panel concluded that the list does not represent a complete and final solution. The panel recognized that it is unrealistic to believe that piracy can ever be completely eliminated. Even in the United States, where fairly rigorous laws exist for addressing and attacking piracy, the problem still exists, though at a lower level. Pirated videocassettes, for example, are estimated to make up 5 to 10 percent of the U.S. rental inventory. Pirated software programs in the workplace are estimated at several times that level, although no firm numbers are available. The issue, therefore, is one of curbing piracy to prevent an even greater flood of counterfeit or illegally duplicated products.

Piracy can be significantly curtailed only through an evolutionary process; additional remedies will be generated only as governments address the issue. Several options discussed below are already being implemented but are listed to bring attention to them and encourage their expansion.

The dozen options are grouped by the sector of government or industry that should take the lead in considering or implementing them. (Other sectors clearly would have to be involved.)

## EXECUTIVE BRANCH ACTIONS

**1** *Demonstrate and document how intellectual property protection provides economic and cultural benefits for developing countries.*

Over the past decade, the U.S. government has increasingly recognized the benefits of having strong intellectual property protection. It encourages innovation, creativity and the entrepreneurial spirit that creates new industries and jobs, and is an outgrowth of an open and democratic society.

Various foreign countries that resist proposals to strengthen their laws have disagreed with this reasoning or at the very least have remained unconvinced that the benefits apply to them. In some countries, the suppression of intellectual property rights is tied to the suppression of other individual rights.

The federal government should arrange for a government agency, such as the congressional Office of Technology Assessment, or academic researchers, to make a complete, balanced and fully credible analysis of the economic and cultural benefits that strong intellectual property laws provide to societies. The study would also address the relationship between strong intellectual property laws and the rights of the individual within society.

We trust that extensive analysis, with a strong quantitative element, would help make the case for intellectual property law reform abroad and strengthen our own resolve at home.

**2** *Monitor the effectiveness of U.S. Trade Representative actions.*

Over the past several years, the U.S.T.R. has increased its pressure on foreign governments to improve their intellectual property laws. In the background, the U.S. Patent and Trademark Office and the U.S. Copyright Office helped the U.S.T.R. analyze foreign intellectual property laws and negotiate international agreements relating to intellectual property rights. However, these offices have lacked the personnel to keep up with their other duties and assist the U.S.T.R., which has increased the burden on the U.S.T.R. in meeting its "Special 301" commitments.

Current U.S.T.R. negotiations under the Special 301 provision and their outcomes will need to be monitored during the coming year to determine how effective the procedure is. Most observers have great hopes for the procedure. Special 301 provides a potentially significant sanction to discourage piracy; however, in many situations the "stick" alone will not work without "carrots" to encourage appropriate reforms. The government should consider offering "carrots" such as favorable changes in trade status or tariffs or flexibility in renegotiating foreign loans.

**3** *Strengthen the enforcement of intellectual property rights abroad and in the United States.*

What good does it do to have a strong intellectual property law if the police ignore the law or an inadequate court system delays hearing cases and then merely imposes a minor penalty?

*Venezuelan police stage a burning of illegally copied videocassettes for photographers to dramatize crackdown on piracy. Photo courtesy of MPEAA.*

The laws will have little effect if they are not adequately enforced. The U.S.T.R. must analyze the adequacy of not only the foreign intellectual property laws but also the efforts of the police and courts. In some countries, the problem lies in basic judicial system inadequacies that delay legal actions for years. In our own country, we must also increase efforts to ensure adequate enforcement of laws against pirated imports. There must be adequate remedies such as immediate seizure of pirated products, rapid adjudication of piracy allegations and significant penalties against the convicted pirate, including imprisonment when appropriate.

In the last five years, Hong Kong and other countries that previously did not recognize intellectual property rights have made significant progress in establishing legal remedies. The next phase appears to be to make them work through effective enforcement.

Unfortunately, even in the United States, law enforcement, prosecutors and the courts too often exhibit a mixed response to piracy. The federal government should strengthen civil and criminal penalties for piracy and increase statutory damages.[78]

Clearer guidelines for enforcement of the criminal penalties are needed. Under new federal sentencing guidelines, defendants charged with operating a major video piracy ring in the New York City area drew significantly tougher criminal penalties in March 1989 than previous cases would have suggested.[79]

Many officials lack a full understanding of the laws or the nature of piracy, which hampers enforcement. To ensure that the courts effectively deal with intellectual property laws, a program should be established to educate our judges so that they will better understand what constitutes intellectual property and how the intellectual property laws operate. Federal judicial conferences, bar associations and groups such as The Annenberg Washington Program should work to establish such educational programs.

The federal government as well should take appropriate steps to educate those people in the federal and state governments who deal with these problems so that they have a better understanding of both the laws and the nature of the problem.

**4** *Establish a presidential commission to analyze U.S. intellectual property policy and protection and establish mechanisms to implement the policy.*

Though the government has recognized the importance of having a strong intellectual property system and has adopted many laws and regulations to strengthen and broaden the protection of intellectual property, the laws often have been adopted on a

piecemeal basis without review of the entire body of relevant laws or the impact of actions of various agencies that undermine the government's policy of strengthening intellectual property protection.

Different arms of the government apparently are working at cross-purposes in the pharmaceutical field, for example. The U.S. Agency for International Development and the Food and Drug Administration are teaching foreign companies how to manufacture prescription drugs at the same time that other parts of the government, including the U.S.T.R., are trying to convince countries to stop the production of unlicensed and unbranded drugs that infringe upon U.S. patents.[80]

As the government has expanded the scope and responsibility of agencies that deal with intellectual property protection and negotiate international intellectual property agreements, it has not always provided the budgetary support necessary to fulfill the increased responsibility.

A presidential commission should be established to develop a national mandate for intellectual property laws, defining the role that intellectual property plays in our information/service economy, and to review:

- the effectiveness of all U.S. intellectual property laws and their enforcement.
- the interrelationship of those laws with other policy areas, such as trade, foreign aid, support of small businesses, research funding and agricultural aid.
- the coordination of the many agencies that address intellectual property issues. Their actions often have not been properly coordinated. For example, problems have arisen as a result of policy conflicts between the State Department and the U.S.T.R. Among the departments involved in intellectual property matters are the Department of Commerce (including the Patent and Trademark Office), the U.S.T.R., the Library of Congress (including the Copyright Office), the Department of State and the Department of Treasury.
- the adequacy of spending on enforcement programs.
- means of elevating intellectual property protection within the U.S. government. We suggest that the government put a higher priority on intellectual property protection. The commission should consider, for instance, whether a new Office of Intellectual Property would be useful in coordinating all government activities in the area. "Intellectual property desks" should be created in U.S. embassies abroad, at least in countries with a high incidence of piracy.

In the field of international trade, the protection of intellectual property has received proper attention; the 1988 Trade Act required the U.S.T.R. to consider the objective in its foreign market access analysis. We recommend that intellectual property protection receive this priority in other relevant government deliberations. The U.S. Customs Service, for example, should consider an importing country's intellectual property protection when assessing tariffs, the Department of Education and the U.S. Information Agency should implement outreach programs to combat piracy at home and abroad, and the U.S. Treasury could consider a foreign country's intellectual property laws when renegotiating foreign debt. The important objective here is a national policy that reflects the substantial economic interest of intellectual property protection.

## CONGRESSIONAL ACTIONS

**5** *Hold congressional oversight hearings.*
While Congress has been actively involved in the intellectual property area for several years, it should now hold comprehensive oversight hearings to review the impact of relevant laws and the occasionally conflicting actions of the various government agencies involved in intellectual property matters, and develop a set of uniform policy objectives.

**6** *Expand criminal penalties for piracy in new media technologies.*
Congress should assess the adequacy of existing criminal laws in dealing with present media technologies and the laws' flexibility in fighting piracy in new technologies. In particular, Congress should consider expanding the recently adopted laws against trafficking in counterfeit labels and trademarks. Provisions of the copyright laws, in 18 U.S.C. Section 2318, adopted in 1982, provide criminal penalties for counterfeiting of labels for phonograph records, motion pictures and other audiovisual works. The Trademark Counterfeiting Act, in 18 U.S.C. Section 2320, adopted in 1984, provides penalties for counterfeiting trademarks of goods or services. If these laws have helped curb certain kinds of domestic piracy and the importation of pirated products, Congress should strengthen and expand the

laws to curb other forms of piracy.

As part of the review, Congress should also assess the pirates' enhanced technological capabilities. For example, with the growing sophistication of computer technology, computer "hackers" can obtain unauthorized access to computers and copy their programs and data. Similarly, pirates with satellite dishes can extract broadcast signals from the airwaves and retransmit them for commercial purposes. Suitable criminal sanctions should be considered.

Uniform sentencing guidelines used by prosecutors and judges in penalizing pirates have meant more consistent sentences for violators in the United States. The guidelines assist enforcement officials and judges who may rarely prosecute and judge such cases. The same consistency could be promoted internationally by action of such international organizations as the subregional conferences of WIPO.

Legislating appropriate penalties for infringement is only half the battle, however. In the end, enforcement will determine whether piracy flourishes or is rooted out. Effective enforcement, strengthened penalties and restitution schemes are essential. If antipiracy efforts are so feeble that they become nothing more than "the cost of doing business" for the pirate, while fighting piracy becomes an impossible burden for the rights owner, they will be not only ineffective but counterproductive.

## INTERNATIONAL ORGANIZATION ACTIONS

**7** *Increase antipiracy efforts of global organizations, and establish worldwide adequate minimum standards to guide national governments.*

For the past several years, GATT and WIPO have actively addressed intellectual property concerns.

There also have been similar efforts in the International Telecommunications Union; however, the Union should be encouraged to increase its activities in this area.

The International Chamber of Commerce, likewise, has worked on drafting various international codes and should be encouraged to become active in the area of intellectual property.

These international governmental organizations must be persuaded to establish worldwide adequate minimum standards for intellectual property laws. World organizations would then be able to press countries to adopt at least the uniform adequate minimum standards.

We must, however, recognize that the United States may have to compromise its own policies if it participates in development of international standards. We cannot push for international harmonization and then reject aspects that are not completely to our liking. Other governments have occasionally complained that U.S. laws do not adequately protect certain kinds of intellectual property.

Private institutions have successfully participated in international negotiations, providing reasoned and balanced input. For example, the Intellectual Property Alliance, the Trademark Association, the Pharmaceutical Manufacturers Association, the U.S. Chamber of Commerce and the Intellectual Property Committee contributed to the success of the Uruguay Round of the GATT negotiations by promoting and justifying specific goals and initiatives.

**8** *Standardize evidentiary and procedural requirements and sanctions for enforcement overseas, and develop an international registry for proof of ownership.*

Because of inconsistencies in the evidentiary and procedural requirements of various countries' judicial systems, problems occasionally arise in enforcing certain intellectual property rights–for instance, in establishing proof of ownership in foreign enforcement actions. International standards of evidentiary proof with respect to at least certain basic issues of intellectual property rights should be established to facilitate enforcement of rights abroad.

Standards for sanctions against pirates are also needed. Sanctions should include restitution adequate to compensate the intellectual property owner for both actual losses and legal costs. Laws should be changed to grant restitution for piracy in the form of civil monetary damages in a successful criminal case so that the intellectual property owner seeking restitution need not pursue a separate civil suit against the infringer. The sanctions might suitably be imposed on businesses that knowingly sell pirated products and willfully violate intellectual property rights as well as on pirates themselves.

Proving ownership is a great burden for the copyright owner in some countries. An active pirate may have infringed tens of thousands of different titles. In many countries, the courts require each instance of piracy to be proved. In the United States, however, a plaintiff can show piracy on a random sampling

of seized goods, and the court presumes that the remainder of the goods are pirated. A universal, worldwide registry of ownership of audiovisual works would quickly and inexpensively facilitate the often onerous task of proving ownership in foreign courts. Streamlined, simple proof of ownership, already available in the U.S. judicial system, should be implemented worldwide. The emphasis should be on streamlining rather than standardizing the system. The U.S. government should support the worldwide audiovisual registry that WIPO has under consideration.

## PRIVATE SECTOR ACTIONS

**9** *Expand private international organizations' initiatives against piracy.*

Too often U.S.-based companies have been alone in promoting intellectual property protection in foreign countries. Their efforts are often viewed as Americans "throwing their weight around." Faced with a unilateral U.S. initiative, other countries can and do ignore our sanctions, avoid reform and take their business to the Europeans or the Asians.

Pressure can be brought more effectively by international organizations representing a single industry or a multitude of industries worldwide. The Motion Picture Association of America (MPAA) and the Recording Industry Association of America have been particularly successful in joining with their counterparts in other countries and with local groups in presenting their antipiracy programs to foreign governments. MPAA, for example, directs its worldwide antipiracy activities from regional offices located in key cities around the world, staffed with association personnel and fully or partially funded by the association. (See MPAA's "Fact Sheet: Film and Video Piracy," Appendix C.) The motion picture antipiracy effort, however, is implemented abroad largely through national federations composed of domestic as well as U.S. and other foreign producers and distributors. This allows MPAA's half-dozen overseas antipiracy offices to be involved in programs in some 60 countries and makes use of the local executives' special expertise and familiarity.

Other industries, such as computer software and publishing, could benefit from similar concerted action.

**10** *Involve local creative industries abroad in the antipiracy fight.*

Foreign industries that benefit from intellectual property laws are natural allies of U.S. and international advocates lobbying for stronger antipiracy enforcement. The local recording industry in Indonesia, for example, helped significantly in convincing the Indonesian government to pass an effective copyright law.

In addressing piracy in a country, international organizations should work closely with national groups that can help persuade their governments that effective intellectual property laws would bolster the country's standing in the international community, encourage foreign investment and benefit the local economy. Where there is no local industry creating intellectual property, interest in stronger protection could nevertheless be created by the (somewhat risky) technique of selecting a few of the foreign country's most successful pirates and appointing them as authorized distributors. In essence, they would become "stakeholders" interested in the adoption and enforcement of effective intellectual property laws.

Another way to develop local stakeholders would be for U.S. businesses to bid on the rights to license locally created intellectual property, with the royalty payments split between the local creators and their governments. Both the local creators and their governments would then have a direct interest in protecting intellectual property rights.

A third possible approach is for U.S. government and industry to help the local economy during the period of adjustment after adoption of intellectual property laws. The adjustment assistance would be most useful in small, less developed countries that are not yet highly involved in international trade.

**11** *Set prices at levels affordable by consumers in foreign markets.*

Foreign leaders often argue that they must let pirates stay in business because they are the only providers of a needed product or information at a price the country's consumers can afford. Piracy arises naturally where legally marketed products or information are available only at prices far beyond the economic reach of consumers. In these situations, corporations should establish programs to provide the needed goods at locally affordable prices. Ideally, prices would be low enough to permit the flow of

information or technology within the country and minimize the stimulation of piracy. While dropping prices will not necessarily curb piracy, it will at least rebut the local government's argument that, without piracy, useful information or technology would be virtually unavailable to its citizens.

It must be recognized, however, that legitimate industry can never compete strictly on price with the pirates, who have no expenses for development or marketing and may even skimp on quality. With such low operating costs, pirates can always undercut the price of the legitimate industry.

Furthermore, firms that cut prices abroad have a legitimate concern that their low-price products will be exported to the "gray market" in more affluent countries. U.S. courts have been somewhat reluctant to protect manufacturers against gray-market competition. They have tended to allow imports of legitimate goods produced under the control of the owner of the intellectual property rights and the owner of the U.S. trademark, even when prices of those goods were reduced for sale abroad. Congressional action is needed to limit imports of such gray-market goods, especially in cases where the manufacturer cut costs and quality to sell at a lower price abroad.

Lowering prices for foreign markets will work in certain instances and not in others. Price must be balanced against the cost of distribution. Sometimes even with lower prices it is still not possible to compete against the pirates. But this does not work as a blanket argument against affordable pricing.

**12** *Establish educational programs for consumers and professionals, here and abroad.*

Business and government professionals as well as average consumers have remarkably little understanding of piracy and its impact. Educational programs spanning many fields of business, sponsored by government or industry, could help enormously in raising awareness of the problem.

Unfortunately, the United States lacks a central institute for advanced study of intellectual property protection, such as those in West Germany and Japan. In fact, the U.S. Patent and Trademark Office recently discontinued funding for training of foreign patent officials. This is unfortunate because we could reasonably expect wider appreciation for protection abroad if more foreign intellectual property producers temporarily studying and working here, including researchers, scientists and graduate students, learned about the methods and benefits of intellectual property protection.

*Antipiracy poster circulated in Taiwan by the local MPEAA-related Foundation for the Protection of Film and Video Works.*

The importance of an effective public outreach program, even in bottom-line terms, should not be underestimated. The motion picture industry's experience in Japan has been revealing. After government officials had widely denounced piracy as theft, many video pirates actually submitted to voluntary searches by industry investigators and purged their inventories of pirated products.[81] Even in the United States, investigators for the MPAA have encountered numerous retailers who recently rid their shelves of illegally duplicated videocassettes after reading newspaper reports about raids against pirates.

Educational programs are needed at least at the university level and possibly also at the secondary school level to address the benefits of effective intellectual property laws and the detrimental impacts of infringement. We still need to make the efforts to raise the level of public consciousness, in this country and others, about the many faces and great costs of piracy.

# COMMENTARIES BY PANEL MEMBERS

**LARRY F. DARBY**
Economist, Darby Associates

*The merger of several streams of technology continues to ease and cheapen the manipulation, replication and distribution of information in electronic formats. Assorted applications of the technologies related to textual, visual, aural and other programmed materials have spurred the development of substantial overseas markets for products and services specifically derived from assets owned by U.S. companies and protected domestically by U.S. intellectual property (principally copyright) laws.*

*Many of these markets are supplied in large measure with the help of unauthorized and uncompensated use of intellectual property–films, audio recordings, textual materials and computer programs, for example–owned by U.S. companies. Given the evolution of the composition of U.S. output toward greater shares of gross output originating in the information goods and services sector, the substantial current economic cost to U.S. interests of unencumbered growth in "piracy" of our intellectual property is assured to become more and more serious over time.*

*The majority report more or less makes these points and to that extent I concur with it. However, to buttress its conclusions and the subsequent policy recommendations, the report makes several findings that I am unable to confirm. Thus, I am compelled to express some personal views separately.*

*The title of the report creates an expectation that the extent of commercial piracy of U.S. intellectual property has been explored in some depth by the study participants. That expectation is not satisfied. The evidence of economic harm in the report reduces to citation of a "back-of-the-envelope" extrapolation of the results of what appears to be a very casual International Trade Commission survey. The report also cites some anecdotal evidence.*

*While I am prepared to accept generally that the international scope of the problem is large and increasing, the evidence presented here of its actual scope and magnitude has very little probative value and warrants* at best *the Scottish verdict, "Case not proven!"*

*More importantly, the weakness of the evidence adduced by the committee seriously undermines the case for exercising any of the more dramatic policy options, e.g., creating a Presidential Commission, establishing intellectual property desks in selected embassies abroad, and interjecting intellectual property protection considerations into Treasury renegotiations of foreign debt liabilities to U.S. commercial banks. Further, to the extent that important political decisionmakers share my view as to the validity of the estimates of harm to U.S. stakeholders, the report may simply be discounted as another special interest pleading and, ironically, provide a barrier to doing anything.*

*I believe that economic welfare in developing countries would in the long run be enhanced by the adoption and enforcement of some form of intellectual property protections, though not necessarily of the form prevailing in this country. Nevertheless, adoption of such protections is not a costless proposition. I am concerned that we on the committee have not properly accounted for those costs in the report. Instituting protections for U.S. intellectual property owners will undoubtedly create both losers and winners in developing countries in both the short and long run; and, notwithstanding the claims of the report, the net effect in the short run will probably be negative. For example, the report disputes the conclusion of economists in developing countries that the introduction of intellectual property protections will raise*

*product price in the short run. However, the essence of intellectual property protection is to confer and protect monopoly power of the property owner, thereby restricting entry into the marketplace of nonowners and/or nonlicensees. To state, as the report does, that improved intellectual property protection will aid market entry and thereby lower product price simply does not square fully with either economic theory or historic market experience.*

*Although space does not permit elaboration here, there are several other statements of economic conclusion in the report, that I would restate as hypotheses to be tested by further analysis. Finally, any future inquiry should expand the focus of U.S. interest beyond profits foregone by U.S. firms to include as well the effect of overseas intellectual property protection on other long-term cultural and political goals of the United States. Of course, U.S. industry should neither escape nor bear the entire cost of promoting such noneconomic, but nevertheless worthy national goals.*

C. MICHAEL HATHAWAY
**Senior Deputy General Counsel, Office of the U.S. Trade Representative**

*There are two facets to the problem we have loosely called the "piracy of intellectual property rights:"*
*1. problems in the laws affecting intellectual property rights–which include the absence or inadequacy of substantive standards of intellectual property (such as the exclusion of classes of articles and works from patent and copyright laws), and the presence of laws intended to undermine the full use of intellectual property laws (such as conditions placed on licensing or investment); and*
*2. problems in the enforcement of intellectual property rights–which include defects in the laws used to enforce rights (administrative and judicial, civil and criminal), and an inadequate commitment to effectively use those laws (which can manifest itself through insufficient resources and an intangible, intentional absence of dedication).*

*These problems are prominent in countries that do not share the United States' strong policy of intellectual property protection–"To promote the progress of science and the useful arts. . ." [U.S. Constitution, Article I, Section 8]–but they may be even more entrenched in countries that accept the principle but have made special exceptions in response to what are essentially protectionist domestic pressures. Reversing those political decisions is not an easy task, and no single initiative will solve all the problems.*

*At this point, at least the U.S. business community, the Congress and the Executive Branch (in that order) have recognized the need to address the problem of other governments seeking to extract for their businesses the economic benefits from the creative work of ours–without paying for it. And we are not alone in the community of nations. But the problem is recognized, it is not solved.*

*This project makes an important contribution, not only in the analysis of problems and suggested solutions, but in providing direction for future work. If the momentum for solving intellectual property problems of the last five years is to be continued, the U.S. private/public partnership cannot rest on past accomplishments. This work needs to be done.*

**WILLIAM P. NIX**
Senior Vice President and Worldwide Director,
Anti-Piracy Program, Motion Picture Export Association
of America

*The private sector is especially important in the overall antipiracy effort because commercial marketing methods often create the conditions that give rise to piracy. Piracy in many instances is merely a symptom of a deeper underlying lag in the development of new channels of distribution to meet consumer demands.*

*In many instances, these "pirate uses" are not viable for legitimate companies that must pay artists' royalties and comply with local tax, censorship, customs and other laws.*

*In other instances, as with the evolution of the home video, cable TV and satellite fields in the motion picture and television industries, it is important that the private sector examine objectively how these new uses may best be "developed" into legitimate channels of distribution. This will often be one of the most effective means for ensuring that they do not destroy logical sequential distribution patterns that maximize revenues from film and television programming.*

*These "marketing gaps" cannot effectively be dealt with by government fiat or regulation. The private sector must get involved and develop creative marketing approaches that will help close windows of opportunity for the pirates made available through existing marketing schemes and changes in technology.*

*This is not to exclude the need for substantial public sector involvement in the antipiracy process. There can be no real prospect of controlling overseas piracy of U.S. intellectual property without the active participation of the government in Washington and supporting actions by their counterparts in other countries and our overseas trading partners. The private sector must take the lead to ensure that world governments give these issues the proper priority they require.*

*Without this symbiotic involvement, it will be impossible to keep copyright safeguards in line with constantly changing marketing and technology. The best defense for businesses victimized by counterfeiters and pirates is to strike back rather than rely on government agencies, the police or the courts. It is the marriage of public and private sector support in fighting piracy that holds the greatest promise for dealing counterfeiters and pirates a decisive death blow. Without both, the war against piracy cannot be won.*

# APPENDICES

## APPENDIX A

**Business Software Association White Paper on International Software Issues: Intellectual Property Protection, Market Access and Piracy, December 1988**

### OVERVIEW

The United States supplies most of the world's software, generating a large trade surplus in this vital sector. The young and immensely successful U.S. software industry holds even greater potential for the future as software becomes increasingly important throughout the world.

But U.S. leadership in software is being challenged. In addition to foreign industrial policies that seek to undo the entrepreneurial gains of U.S. companies, the U.S. industry faces serious obstacles in the form of inadequate intellectual property protection and improper trade impediments in a world market burdened by rampant piracy.

The U.S. software industry is a singular national asset, in danger of literally being stolen. National policy must assign top priority to insisting that foreign governments fully protect intellectual property rights in software, open their markets to legitimate products, and cease tolerating software theft.

### ESSENTIAL POINTS

***1. The United States leads the world in software.***
The United States supplies at least 70 percent of the world market for software.[1] Worldwide revenues of U.S. software firms in 1987 were $31 billion.[2] U.S. leadership creates a sizable trade surplus: whereas U.S. software imports are negligible, U.S. firms' foreign sales of packaged software in 1987 were approximately $9 billion.[3]

Personal computer software is one of the most dynamic and rapidly growing segments of the software market. Worldwide revenues of U.S. personal computer packaged software vendors in 1987 were approximately $4 billion,[4] and available data indicate that sales are increasing in 1988 at an annual rate of approximately 50 percent.[5]

***2. The U.S. software industry holds tremendous promise.***
In contrast to the computer equipment industry, software industry growth continues in both employment and revenues.[6] Since 1985, more people in the United States have been developing software than computer equipment; this shift reflects "the growing importance of software as a competitive factor in computer markets worldwide."[7] The potential for further development is virtually unlimited.

***3. Despite its preeminence, the U.S. industry faces significant challenges.***
Foreign competitors "recognize the critical nature of software and are striving to close the gap,"[8] and governments in Europe and Japan are sponsoring extensive research and development in software.[9] In the midst of such developments, U.S. software companies find that governments in every part of the world fail to protect intellectual property rights and deny fair access to markets. Theft of software products is widely practiced and widely tolerated.

***4. Software piracy abroad costs the United States billions.***
In a recently released report, the U.S. International Trade Commission estimated that 1986 aggregate worldwide piracy losses of just 31 computer and software firms were $4.1 billion.[10] Total losses are undoubtedly much higher and are believed to be concentrated in software because of the ease with which it is pirated. Software costs much to develop but almost nothing to duplicate.

***5. International software piracy is pandemic.***
Extensive software piracy occurs all over the world. It is found not only in developing and newly industrialized countries, such as those in Asia and Latin America, but also in major industrialized nations in Europe, the Pacific, and elsewhere. In a number of countries, unauthorized copies of software products hold a greater share of the market than legitimate products.

***6. Software piracy takes many forms.***
Although international software piracy includes illegal retail businesses that operate on the streets and through mail order

operations, the problem is much broader. Dealers in computer hardware have been found to distribute unauthorized copies of software with new machines to induce customers to purchase the equipment. And in a number of markets, organizational users–corporations, public agencies, and others–practice pervasive unauthorized internal reproduction of software.

***7. International legal protection of software is inadequate.***
In some countries, laws against unauthorized copying simply do not exist. Others have general copyright laws that do not explicitly protect computer programs. Still others have copyright laws that do extend to software, but even in these countries the laws are sometimes vague on the scope of protection and are often ignored or underenforced. In most countries, criminal prosecutions are infrequent, and civil proceedings are costly and slow. A software company seeking to protect its rights against unauthorized copying is often required to engage in problematic litigation at considerable expense in a highly unsympathetic forum.

***8. The U.S. software industry also faces explicit trade barriers.***
Brazil has excluded U.S. software products on the basis of putative "local equivalents." In an important case, the so-called local equivalent was a clone of the very U.S. product being excluded and actually contained pirated program code. Although Brazil now states that it will admit certain products into its market, the continuing threat of U.S. sanctions is essential to any genuine opening of the market.

***9. Intellectual property protection and market access for software are issues requiring the highest levels of attention and action.***
The U.S. software industry seeks not to resist foreign competitiveness but to defend legitimate competition in world markets. This objective warrants the forceful support of the U.S. government. As an initial response, we propose the following steps:

- U.S. officials at the highest levels should personally insist on strengthened intellectual property protection, antipiracy measures, and market access in countries with deficient policies in these areas.
- U.S. negotiators should explicitly raise software issues in multilateral and bilateral negotiations with pertinent countries, especially when negotiations relate to efforts by such countries to increase exports to the United States.
- To the extent feasible within the GATT Procurement Code, the United States should refuse to transact business with any entity engaging in software piracy or with entities from countries that acquiesce in software theft or denial of market access.
- The U.S. Trade Representative should include countries with the highest levels of software piracy and software trade barriers on the U.S.T.R.'s list of the most egregious violators of U.S. intellectual property rights pursuant to the 1988 Trade Act and should initiate Section 301 proceedings against such countries in the absence of significant, immediate and lasting improvement.
- Benefits under the Generalized System of Preferences (GSP) and other preferential tariff treatment arrangements should be denied to countries that tolerate software piracy or deny market access.
- Development of a GATT Intellectual Property Protection (IPP) Code that addresses software protection, and adherence to such a code by countries with high levels of software piracy, should be vigorously pursued.
- Other measures to protect rights in software and to open markets for software should be studied and pursued.

## CONCLUSION

Software piracy and other barriers to trade in legitimate software products threaten a key source of U.S. economic strength and violate important U.S. rights. These issues therefore require vigorous and sustained action in trade policy, economic policy and foreign policy so long as such practices remain unchecked.

DOUGLAS E. PHILLIPS,
President,
Business Software Association
Washington, D.C.

The Business Software Association was recently formed by six leading companies in the personal computer software industry: Aldus Corp., Ashton-Tate Corp., Autodesk Inc., Lotus Development Corp., Microsoft Corp., and WordPerfect Corp. BSA's purpose is to promote free trade in legitimate business software around the world.

1. Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action*, COM (88) 172 final, Section 5.2.4 at 171 (7 June 1988) (hereinafter "EC Green Paper"). *See also* U.S. Department of Commerce, *A Competitive Assessment of the U.S. Software Industry* 32 (December 1984).

2. U.S. Department of Commerce, *1988 U.S. Industrial Outlook* 30-1.

3. *See id.*

4. *Id.*

5. Software Publishers Association, "PC Software Industry Continues Rapid Growth" (October 31, 1988) (press release on North American sales).

6. U.S. Department of Commerce, *1988 U.S. Industrial Outlook* 30-1.

7. *Id.*

8. *Id.*

9. *Id.* at 30-9; EC Green Paper Section 5.2.5 at 172.

10. *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade*, Report to the U.S. Trade Representative, Investigation No. 332-245, Under Section 332(g) of the Tariff Act of 1930, at 4-3 (January 1988).

# APPENDIX B

**Omnibus Trade and Competitiveness Act of 1988 Submission to U.S. Trade Representative by the International Intellectual Property Alliance, February 6, 1989**

This is in response to the Request for Written Submissions appearing in 54 Fed. Reg. 2033 (January 18, 1989) in connection with the identification of "priority foreign countries" under Section 182 of the Omnibus Trade and Competitiveness Act of 1988.

The International Intellectual Property Alliance ("Alliance") is an organization formed in 1984 which represents the U.S. copy-

right-based industries in both bilateral and multilateral efforts to improve the protection of U.S. copyrighted works internationally. It is comprised of seven trade associations, each of which in turn represents a significant segment of the U.S. copyright community. Together Alliance members represent more than 1,600 U.S. companies accounting for over 5 percent of the U.S. GNP. Alliance members are the Association of American Publishers (AAP), the American Film Marketing Association (AFMA), ADAPSO: The Computer Software and Services Industry Association (ADAPSO), the Computer & Business Equipment Manufacturers' Association (CBEMA), the Motion Picture Association of America (MPAA), National Music Publishers' Association (NMPA) and the Recording Industry Association of America (RIAA).

The Alliance is still in the process of assembling information from its members by which we seek to (a) quantify trade losses due to copyright piracy and market access restrictions in problem countries and (b) describe the nature of the laws and practices in such countries which cause these losses. When such information is fully available, the Alliance will, at the earliest possible date, supplement the information provided herein.

Based on current information, the Alliance has identified the following countries as having caused the greatest collective losses to Alliance members in 1988. These countries are: Korea, Taiwan, Thailand, Saudi Arabia, Philippines, India, People's Republic of China, Malaysia, Indonesia, Egypt, Brazil, Nigeria.

The following is a summary discussion of the situation that pertains in each of these "problem" countries and a very preliminary estimate of the losses suffered. As noted, information will be supplemented as soon as possible by a more detailed analysis of losses, and the reasons therefor, to be submitted in a format similar to the Alliance's August 1985 submission to U.S.T.R. entitled "Piracy of U.S. Copyrighted Works in Ten Selected Countries."

## KOREA

As a result of a Section 301 trade investigation on intellectual property practices commenced in 1985 by U.S.T.R., the Korean government has adopted generally satisfactory new laws protecting copyrights and has afforded protection for U.S. copyright owners through adherence in October, 1987 to the Universal Copyright and the Geneva Phonograms Conventions. Unfortunately, however, this most welcome development has not been accompanied by a willingness of that government to meet its further commitments to the U.S. on the enforcement of these new laws for the benefit of U.S. copyright owners. In the 1-1/2 years since U.S. copyright owners were granted copyright protection in Korea, only minimal attempts have been made to deter piracy through enforcement of these new laws. While losses have been somewhat reduced merely as a result of the adoption of new laws, piracy remains pervasive in Korea. Losses will remain high until Korea develops the political will to penalize those who continue to flaunt its new laws.

Losses for 1988 in Korea are estimated to be at least $100 million. The Alliance has recently provided to the Korean government a detailed enforcement plan designed to make immediate gains in reducing piracy and to bring Korea into compliance with the trade agreement entered into with the U.S. It is evident that Korea is currently in breach of its commitments to the U.S. Unless these recommended enforcement actions are taken by May 1, 1989, the Alliance will seek to have Korea declared formally in violation and will request immediate trade retaliation.

## TAIWAN

While some gains have been made in reducing piracy as a result of adoption of a new copyright law by Taiwan in 1985, U.S. copyright owners continue to experience losses due to (a) continued inadequacies in Taiwan's copyright law or its interpretation and (b) woefully inadequate enforcement against local pirates of U.S. works.

While trade losses have been reduced since 1985 to no less than $50 million in 1988 (down from almost $200 million), U.S. copyright owners are continually frustrated at the difficulties placed in their path by Taiwanese authorities. With respect to legal inadequacies, Taiwan has so far refused to interpret its copyright law as affording an exclusive right of public performance for motion pictures. Accordingly, continued growth of MTVs [video parlors] in Taiwan has severely injured U.S. motion picture companies. The lack of an exclusive translation right in Taiwan has also caused U.S. book publishers significant losses. However, as a result of virtually completed negotiations on a new bilateral copyright agreement, it appears that this latter legislative omission will soon be eliminated.

A major contributor to U.S. piracy losses in Taiwan has been the difficulty of bringing effective enforcement action against Taiwanese pirates. Taiwan has become infamous for failure to punish its infringers. Unless Taiwan is prepared in the next few months to demonstrate the political will to deter further piracy through aggressive enforcement, it must continue to be placed high on the list of problem countries.

## THAILAND

Thailand is virtually the last territory in the East Asian region to commit to an adequate regime for the protection of U.S. copyrights. Losses in 1988 are estimated to be at least $60 million. The President's recent action to reduce Thailand's GSP benefits will hopefully demonstrate that the U.S. will no longer condone inadequate copyright protection by Thailand. Thailand remains a major problem country for U.S. copyright owners.

## SAUDI ARABIA

While Saudi Arabia appears to have formally adopted copyright principles in its domestic law, its failure to implement those principles and enforce them against violators has led to piracy of massive proportions in this crucial Middle East country. Alliance members estimate losses incurred by all industries to be over $180 million in 1988, led by blatant videocassette and record and tape piracy. We are hopeful that the just-completed U.S. mission to Saudi Arabia will have convinced the Saudi government of the seriousness with which the U.S. views this problem and the need for immediate remedial action.

## PHILIPPINES

While the Philippine government has been aware since 1985 of the U.S. government's position with respect to the protection of U.S. copyrights, that government has failed to take the necessary actions to improve the situation. While the change in government in the Philippines has been hailed by the American people and as a result trade confrontations with the Philippines have been consciously avoided, losses due to piracy have increased to well over $100 million over the last four years and can no longer be tolerated. In its 1985 report, the Alliance set forth the areas of

problems in the Philippines copyright law and in its enforcement. Those recommended actions have not been taken to date. Unless significant progress is made in the next months, the Philippines must be designated as a "priority foreign country."

## INDIA

While India generally has a good copyright law, lack of enforcement has been the major contributor to losses which now appear to exceed $70 million per year. A slow and frustrating criminal justice system and certain other government policies (such as stringent screen quotas and other distribution restrictions for U.S. films and government subsidies that encourage the wide export of books printed for India-only sale) have in part contributed to these significant losses.

## PEOPLE'S REPUBLIC OF CHINA

The U.S. had expected the People's Republic of China to adopt a copyright law during 1987-88. While the draft law being considered during that period would not have afforded "adequate and effective protection" to U.S. copyright owners, progress by such an important country would have been nevertheless hailed. Failure of the PRC to take firm action to halt widespread piracy, including its now-apparent unwillingness to provide copyright protection for computer programs, makes it imperative that the U.S. government take a more aggressive posture toward the problem of piracy in China.

It is proving very difficult to estimate U.S. losses in the PRC but the Alliance is confident they exceed $150 million per year. Book and computer program piracy appears to lead the way and recent growth in the number of VCRs in China has contributed to increased piracy of U.S. videocassettes. Record and tape piracy still appears to be a minor, though growing, problem.

## MALAYSIA

While Malaysia adopted a new, strong copyright law in December, 1987 and has to date evidenced an aggressive attitude toward enforcement, that government has not yet provided eligibility to U.S. works. Losses have been reduced to an estimated $25 million in 1988. Malaysia appears to be committed to make various statutory amendments to its copyright law in the first half of 1989 in order to permit that government to sign an already agreed-upon bilateral copyright agreement. While the signing of the bilateral combined with predicted aggressive enforcement would warrant keeping Malaysia off the list, if improvements are not accomplished in this time frame, the Alliance would urge that Malaysia be kept on the list of problem countries.

## INDONESIA

Indonesia has yet to execute a bilateral agreement affording protection to U.S. works. Since Indonesia adopted acceptable copyright law amendments in September of 1987, the U.S. has been patiently awaiting the drafting of acceptable regulations implementing Indonesia's overbroad compulsory license in Article 15 of its copyright law. During this period, the U.S. and Indonesia have agreed on the text of a bilateral copyright agreement affording eligibility to U.S. works. The U.S. has just received these draft regulations and, assuming they are acceptable, full copyright relations could promptly ensue.

Despite this long delay, U.S. industry has been particularly encouraged by the evident commitment of the Indonesia government to enforce its new law. Even though U.S. works are not yet eligible, pirated audiocassettes of both U.S. and non-U.S. origin have virtually disappeared from the Indonesian market. We have been given reason to believe that this aggressive attitude will also prevail against pirates of videocassettes, books and computer programs.

While the current situation with regard to piracy appears hopeful, losses continue to exceed $50 million in 1988. Losses also have resulted from unfair barriers to market access including, for example, those directed at the U.S. motion picture companies' ability to distribute directly in the videocassette and theatrical market in Indonesia.

## EGYPT

U.S. copyright industries are hopeful that U.S. Berne adherence will result in major improvements in protection for U.S. works in Egypt. Failure of Egypt to take any significant action on the piracy front since 1984 has led to increased estimated losses from $23 million in 1984 to over $60 million in 1988. Among the actions which, in our judgment, Egypt must take to avoid designation in May, 1989 include (a) confirming that pre-Berne adherence U.S. works are protected in Egypt, (b) amending its copyright law expressly to cover computer programs, print and electronic compilations (e.g., databases), cable retransmissions and to increase criminal penalties substantially, (c) adopting a law regulating audio and videocassettes, and (d) substantially strengthening its antipiracy enforcement unit and enforcing its law against pirates.

## BRAZIL

Difficulty in getting Brazilian enforcement authorities effectively to prosecute, particularly video and computer program piracy, is the principal problem in Brazil. The extent of piracy is also due to the Brazilian government's denial of effective market access to U.S. motion picture and computer and computer software companies. Audiotape and book piracy appear to have decreased in the last four years. Brazil's unfair discrimination against U.S. industry must be halted if Brazil is to avoid further action under Section 301. The Alliance estimates losses to be at least $30 million in 1988.

## NIGERIA

In December 1988, Nigeria adopted a new copyright law which it appears will satisfy international norms of protection. This action is most welcome and, despite continued and significant losses in Nigeria, we believe a wait-and-see attitude is appropriate for Nigeria at this time.

ERIC H. SMITH,
General Counsel
International Intellectual
Property Alliance

# APPENDIX C

**Fact Sheet: Film and Video Piracy, Motion Picture Association of America**

## INTRODUCTION

Illegal film, videocassette and cable/satellite piracy has mushroomed into a thriving international enterprise. The Motion Picture Association of America (MPAA) and its international counterpart, the Motion Picture Export Association of America (MPEAA), estimate the U.S. motion picture industry loses approximately $1.2 billion a year worldwide in potential revenues. A significant portion of those losses is due to the lack of adequate and effective copyright protection abroad; but piracy is a problem within the United States as well.

In order to maximize revenues, a movie studio typically releases a film in a sequential release schedule. Often that chain includes a first exhibition in U.S. theaters, followed by theaters in the international markets, the domestic home video market, pay cable and then network television and finally broadcast TV syndication. Due to language and special marketing considerations, international home video distribution may trail the domestic release of a film by six months or more. When piracy occurs at the beginning of any of these release cycles, downstream markets are negatively affected.

## ILLEGAL DUPLICATION

Theatrical Prints: Theft of a 35 or 16mm film print from a theater, film depot, courier service or other industry-related facility for the purpose of making illegal copies is the most serious form of piracy. Prints may also be purloined from legitimate advance copies used for screening and marketing purposes. At this stage, the pirate is able to make a relatively high quality videotape from the theatrical print, which then serves as the master for the duplication of unauthorized videocassettes. In some cases, pirates will even use hand-held video cameras to shoot illegal copies right off the screen! These illicit copies can flood the U.S. market or show up overseas before the film is even released internationally.

Back-to-Back Video Copies: The most prevalent form of piracy in the U.S., however, is the "back-to-back" copying of videocassettes. In this case, video retailers simply purchase one or two genuine cassettes from the authorized distributor and then make duplicate copies by hooking up one VCR to another. It is estimated that about 10 percent of the nation's 25,000-30,000 video retail outlets deal in pirated videocassettes, costing the motion picture companies over $100 million annually. Video piracy costs the motion picture industry as much as $700 million or more on a worldwide scale.

Counterfeiting: Counterfeit labels and packaging often accompany the illegally copied videotapes, especially when they are shipped or manufactured overseas. For years before its authorized home video release, *E.T.* was circulated worldwide with counterfeit covers produced from artwork copied from the movie's promotional campaign. Sophisticated labels and markings have been developed by the studios in an attempt to foil the counterfeiters as much as possible.

## SIGNAL THEFT

Another form of piracy, [signal theft] refers to both those who illegally tap into their cable TV systems as well as those who receive satellite signals without authorization. Pirates have made businesses out of supplying consumers with illegally tampered cable decoders or satellite descramblers for this purpose.

Internationally, the problem becomes more acute when programs that are not licensed to a particular country are pirated from satellites and then retransmitted in that country, either by cable TV or broadcast--some private, some even state-owned!

Satellite piracy coupled with cable TV theft is a staggering problem. Over $320 million is lost annually in the United States to these two forms of film piracy, according to MPAA calculations. Technical safeguards and a vigilant program aimed at prosecuting these signal pirates exist and are regularly being enhanced.

## UNAUTHORIZED PUBLIC PERFORMANCES

"Unauthorized public performances," another form of piracy, refer to situations where an institution or commercial establishment shows a tape or film to its members or customers without receiving permission from the copyright owner. This includes "public performances" where an admission fee is charged as well as those that are simply offered as an additional service of the establishment. It does not cover, as defined in the Copyright Act, the showing of a legally purchased film or video to one's family or close friends at home.

## PARALLEL IMPORTS

The "parallel import" problem refers to cassettes or films which are legitimately licensed for sale and/or rental in one country but illegally imported into another. Individuals or companies seize on price differences and effectively "dump" less expensively priced tapes onto a market to undercut the domestic market, resulting in a parallel import problem.

## THE LAW

The U.S. has some of the strongest antipiracy legislation in the world. The Copyright Act of 1976 forms the basis of this protection. In 1982, it was amended to substantially increase the penalties for illegal duplication, making such offenses felonies on the first account. Copyright owners may also file civil lawsuits against infringers, in addition to criminal charges that may be filed by the government. Tough new Justice Department and congressional sentencing guidelines have reinforced these penalties.

Additionally, the Communications Act of 1984 and later amendments to it provide comparable penalties and remedies against cable TV and satellite pirates.

Worldwide, more than 80 nations have copyright laws. MPAA/MPEAA and its affiliated organizations work to strengthen these laws, when necessary, and suggest appropriate penalties as part of copyright reform. In some parts of the world where copyright laws are weak or nonexistent, successful charges have been brought against pirates under other statutes. Laws encompassing everything from receiving stolen goods, trademark violations, smuggling, and failure to pay customs duties have all been successfully used in prosecuting film and video pirates.

In addition, intellectual property relations between the U.S. and most foreign countries are governed by an array of multilateral treaties and conventions as well as bilateral agreements, including the Universal Copyright Convention (U.C.C.); Friendship, Commerce and Navigation (F.C.N.) treaties, and the Berne Convention.

Various trade agreements are also relied upon to ensure the free flow and protection of intellectual property among nations.

## TECHNOLOGY

The emergence of new technologies has made illegal duplication easier. It has also offered new means to combat piracy.

For example, the digital encryption encoding of satellite signals has improved the ability of pay television networks and others to protect their affiliate feeds. The CAP (Coded Anti-Piracy) system provides for an identification and tracking system for 35mm theatrical prints. Macrovision is another antipiracy process being used by some studios. It encodes prerecorded videocassettes in such a manner that they cannot be easily duplicated. Similar technologies are under development in research laboratories around the world.

While no technology has yet proven foolproof, these developments do raise the threshold of difficulty and expense for the pirate and therefore help reduce piracy.

The MPAA maintains a toll-free piracy hotline number (1-800-NO-COPYS or 1-800-662-6797) in the U.S. for retailers and consumers to call, if they suspect piracy. The MPAA opened up some 1,200 cases into suspected piracy in the U.S. in 1988 as a result of hotline tips or complaints called in directly to the Association's Los Angeles and New York antipiracy offices.

## IDENTIFYING AN ILLEGAL VIDEO

The presence of any of a series of indicators can help point to pirated cassettes. These include the absence of special markings on the plastic cassette itself, unofficial labeling, tape length that does not correspond to the film's running time, or the absence of special colored gates on some cassettes. Videocassettes can also be analyzed on special electronic equipment to see if they are genuine or counterfeit.

## THE MPAA/MPEAA's ROLE

The MPAA/MPEAA serves as the voice and advocate of the American motion picture and television industry.

The MPAA/MPEAA, on behalf of its member companies, directs a comprehensive worldwide antipiracy program. Begun in the U.S. in 1975, the program has several objectives: to strengthen industry security measures, to strengthen existing copyright protection through legislative activity, to assist local governments in the investigation and prosecution of piracy cases, and to provide technical support in the criminal and civil litigation generated by such investigations.

The MPAA/MPEAA directs its worldwide antipiracy activities from regional offices in London (Europe and Africa); Istanbul (Mediterranean and Middle East); Rio de Janeiro (Latin America); Taipei (Asia/Pacific) and Los Angeles (North America). Worldwide headquarters are in New York.

Additionally, over a dozen film and video security offices (FVSOs) are scattered around the world, directly staffed and operated by the MPAA/MPEAA. A third layer of support is managed through regional counsel and investigators, who work as part of local umbrella antipiracy federations with national producers, distributors and retailers in more than 40 other countries. In total, antipiracy efforts are underway in nearly 60 countries worldwide.

## THE ECONOMIC PICTURE

The production costs of MPAA members' films averaged $18.1 million in 1988, plus another $8.4 million on average for prints and advertising.

Two-thirds of American films never recoup their production, marketing and distribution costs. A major Hollywood studio typically releases between 10 and 15 films each year. The U.S. is, of course, the largest market for MPAA member company films. There were 23,234 movie theater screens, 56.2 million VCR households, 48.6 million cable TV households, including 37.2 million pay TV subscribers and about 325,000 satellite TV and MDS subscribers in the U.S. in 1988.

Yet, the international market is very important to the success of American films. Today, American movies and TV shows are exported to approximately 100 foreign countries. The U.S. motion picture industry returned an estimated $2.53 billion in favorable balance of trade in 1988.

## THE INTERNATIONAL PERSPECTIVE

Piracy is even more virulent overseas than in the U.S. A lack of copyright protection in some countries, coupled with trade barriers and other obstacles to market access, have conspired to choke off American films from legitimate distribution in some markets. In other countries, which have copyright laws, enforcement may be ineffective.

Moreover, American films are typically first released in the U.S., giving the overseas pirates an additional "window of opportunity" to seize upon for their own exploitation. For example, in less than 10 days after the U.S. home video release of *Top Gun* and six months before its legitimate theatrical release in Japan, thousands of copies of this popular film were in Japanese video stores. Some 25,000 cassettes were illegally duplicated from U.S. "masters" and another 10,000 cassettes produced in the U.S. were quickly impo ed into Japan! In countries such as Thailand and Bahrain, it is common for pirated releases to be available in the local market less than one week after their U.S. debut.

Antipiracy programs are either underway or being developed throughout most of the Asia/Pacific region. Two factors characterize the overall region. It boasts the world's largest market potential and it too often figures as a major trans-shipment point for counterfeit and pirated goods.

Piracy can be so rampant in some countries that it threatens other more establisned chains of distribution. For example, runaway video piracy in Taiwan has begun to erode the legitimate theatrical business there.

An effective antipiracy program launched in Japan several years ago has helped turn this all-important video market from one that was virtually 100 percent pirated four years ago to one that now experiences between 20 and 25 percent piracy today. Japan remains the number-one overseas market for U.S. films.

Europe represents a mature market in terms of most lines of film distribution and although piracy is still a major problem there, it is being controlled to some extent. "Community video" is a problem particular to countries like Spain, where apartment buildings are interconnected by cable TV systems, and films are privately transmitted from a VCR hooked up at the building

manager's office. Many of these tapes are pirated copies; regardless, no one has been licensed to transmit these movies for such "community" purposes. The emergence of new satellite networks in Europe may pose new opportunities for the pirates as national borders come tumbling down.

Africa is an example of where substantial market entry has not yet been achieved, although there are few exceptions, such as South Africa and inroads are being made in Kenya. Piracy remains the chief barrier to further market development.

The Middle East represents one of the smallest regions in terms of market potential but is a hot spot in terms of international piracy. Weak or nonexistent copyright laws and treaties combine with an underdeveloped theatrical business and a high volume of foreign workers who have access to overseas films to produce a potent level of piracy, which is all too often transported to other parts of the world.

Latin America is just beginning to witness significant market entry by American movie companies and the growth of a strong legitimate exhibition/retail segment. Brazil, the largest potential market in the region, is estimated to have a 70 percent level of video piracy. Increased efforts at enforcement in many countries in the region, however, are helping reduce the problem. Signal theft is a particular problem in the Caribbean Basin, where nations can receive the signals from domestic U.S. satellites. Some of these pirate operations have been shut down, such as the notorious REXSA in Panama and replaced with local cable systems that have negotiated licenses for the movies they are distributing.

## SUMMARY

Since the antipiracy program's creation, the MPAA's U.S. antipiracy operations have investigated over 10,000 cases of piracy and assisted law enforcement officials in over 1,000 raids, which have resulted in the seizure of almost 300,000 illegal videocassettes and some 32,000 film prints. Over 520 criminal convictions have been obtained so far, with hundreds of civil lawsuits having been filed. Damages awarded to MPAA member companies have totaled well over $2 million.

On a worldwide basis, entire markets have been transformed from almost universal piracy to legitimate home video businesses for both American film suppliers as well as other foreign and local filmmakers. Over 3,000 raids are mounted annually in coordination with local authorities around the world to help put teeth into copyright enforcement efforts. MPAA/MPEAA "source investigations," coupled with security measures, have helped identify and expose international piracy networks that reap enormous profits from the "intellectual property" of American filmmakers at the expense of both U.S. studios as well as undermining film producers, distributors, exhibitors and retailers of all nations.

# ENDNOTES

1. While manufacturing continues to contribute a roughly constant percentage of the U.S. gross national product, it is moving from "heavy" manufacturing to "knowledge-based" or "knowledge-intensive" industrial production. Thus, Americans properly believe the vitality of their manufacturing sector depends on effective incentives for innovation. D. Lamb, Bureau of Economic and Business Affairs, Department of State, "Second Indonesia-U.S. Conference on Economic and Business Relations," Jan. 22, 1987 at 4-5.

2. Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* at 9 (Apr. 1986) [hereinafter "1986 OTA Report"].

3. Informal discussion with Office of the U.S. Trade Representative.

4. *Infra* note 13 and accompanying text.

5. Several panel participants debated whether noncommercial taking of intellectual property qualifies as piracy. The more limited definition has been selected as a better starting point since there appears to be uniform agreement with it as a minimal definition.

6. While the panel did not consider unauthorized home reception of satellite-delivered television programs and noncommercial software duplication to be "piracy," these are still illegal and actionable in court.

7. U.S. International Trade Commission, Publication 2065, *Foreign Protection of Intellectual Property Rights and the Effect on U.S. Industry and Trade* at 4-2 (Feb. 1988) [hereinafter "1988 ITC Report"].

8. A. Branscomb, *Nurturing Creativity in a Competitive Global Economy: Intellectual Property and New Technologies*, Program on Information Resources Policy, Harvard University Center for Information Policy Research (1988) (unpublished manuscript) at 3; T. Raum, "Trade Panel Decries Piracy of Patents, Trademarks, Copyrights," AP, Feb. 26, 1988.

9. 1988 ITC Report, *supra* note 7, at 4-4, Table 4-2 (listing factors that contributed to U.S. companies' losses of revenues because of inadequate intellectual property protections).

10. *Id.* at 4-3, Table 4-1. The Recording Industry Association of America (RIAA) estimates worldwide sales of pirated sound recordings of $960 million.

11. 1988 ITC Report, *supra* note 7, at 4-13.

12. U.S. International Trade Commission, Publication 1479, *The Effects of Foreign Product Counterfeiting on U.S. Industry* at xviii (Jan. 1984). The ITC identified the five industry sectors it finds most subject to counterfeiting: wearing apparel and footwear, chemicals and related products, automobile parts and accessories, records and tapes, and sporting goods.

13. The International Intellectual Property Alliance, *Trade Losses Due to Piracy and Other Market Access Barriers Affecting the U.S. Copyright Industries: A Report to the United States Trade Representative on 12 "Problem Countries,"* April 1989 at ii. The problem countries identified were: People's Republic of China, Saudi Arabia, Korea,

India, Philippines, Taiwan, Brazil, Egypt, Thailand, Nigeria and Malaysia. One of the 12 "problem countries," Indonesia, was not included in the Alliance's piracy loss calculations.

14. Branscomb, *supra* note 8, at 5.

15. *Id.*

16. *International Trade: Strengthening Worldwide Protection of Intellectual Property Rights*, U.S. General Accounting Office, at 15 (April 1987).

17. R. Benko, *Protecting Intellectual Property Rights*, American Enterprise Institute for Public Policy Research at 28 (1987).

18. 1986 OTA Report, *supra* note 2, at 97.

19. *Id.*

20. The Motion Picture Association of America ("MPAA") estimates that 5 to 10 percent of U.S. video shops' shelf inventory is illicit. D. Bollier, "At War With Pirates," *Channels*, March 1987 at 30.

21. 1986 OTA Report, *supra* note 2, at 97.

22. *Id.* at 97, 100-03, 106-11. *See also* Bollier, *supra* note 20 (large number of relatively small, independent video stores in U.S. are very difficult to patrol).

23. Benko, *supra* note 17, at 37-38.

24. For example, software manufacturers are concerned about the ability of "pirates" to circumvent copyright law by restructuring themselves as software rental outfits. The industry is attempting to have the law changed to give the copyright owner the right to authorize the rental. *See* "Software Firms Ask Congress for Protection from 'Pirates'," *Washington Post*, Aug. 25, 1988 at B4.

25. *Intellectual Property Rights--Global Consensus, Global Conflict?* at 5 (R. Gadbaw, T. Richards eds. 1988) [hereinafter "Gadbaw"].

26. *Id.*

27. D. Bollier, "Should Cable Lose Its License?" *Channels*, March 1988 at 65.

28. Benko, *supra* note 17, at 36.

29. *Id.*

30. "No Hiding Place, Copycats Become Less Welcome Round the Asian Region," *Far Eastern Economic Review*, April 24, 1986.

31. Conversation with John Redpath, Home Box Office.

32. William P. Nix of the Motion Picture Export Association of America described the video parlor phenomenon in Taiwan.

33. "Proceedings Before the United States Trade Representative Pursuant to Section 182 of the Trade Act of 1974 as Amended," Business Software Association, February 6, 1989, as modified March 24, 1989 at 12.

34. *Id.* at 13.

35. *Id.* at 14-15.

36. *Id.* at 1.

37. *Id.* at 7, citing "Software Pirates Find Italy's Land Has No Byte," *Financial Times*, April 28, 1988.

38. "The extent of piracy of sound recordings worldwide in 1986," International Federation of Phonogram and Videogram Producers, 1988.

39. William Bowe of Encyclopaedia Britannica, Inc. described encyclopedia piracy in Taiwan.

40. The situation was repeated in Greece in 1988, according to Encyclopaedia Britannica, Inc. A 55-volume encyclopedia in the Greek language, containing numerous articles from *Encyclopaedia Britannica* and the Greek encyclopedia *Papyros-Larousse*, was published with an accompanying publicity campaign. While local courts found an infringement had occurred and that there was unfair competition against Encyclopaedia Britannica's Greek licensee, Papyros, they refused to enjoin further distribution of the pirated volumes. With the licensee's set not yet near completion, an infringing work again enjoyed an improper monopoly in the marketplace.

41. Gadbaw, *supra* note 25, at 21.

42. *Id.*

43. J. MacLaughlin, T. Richards and L. Kenney, "The Economic Significance of Piracy," *printed in* Gadbaw, *supra* note 25, at 107-08 [hereinafter "MacLaughlin Study"] (finding that in seven countries studied merely infinitesimal increases in economic growth rates are required to

offset any short-term loss in economic activity from establishing intellectual property rights).

44. Benko, *supra* note 17, at 28 (presenting arguments of less developed countries against the granting of intellectual property rights).

45. *Id.* at 29.

46. MacLaughlin Study, *supra* note 43, at 97-108 (explaining long-term benefits to granting patent, trademark and copyright protections in developing countries).

47. R. Oman, "Copyright Piracy in The Pacific Rim: Update '86, Before the International Anti-Counterfeiting Coalition," May 29, 1986 at 4.

48. MacLaughlin Study, *supra* note 43, at 89-90.

49. *Id.* at 90.

50. *Id.* at 91.

51. *Id.* at 106-08. A Taiwanese district court found a Taiwanese book company and two of its officers guilty of violating Taiwanese copyright law. The court ordered confiscation of the pirated *Encyclopaedia Britannica* volumes and fined and imprisoned the officers. "Ruling Upholds the Britannica," Reuters, Sept. 26, 1988. Subsequent events have raised questions about Taiwan's enforcement efforts.

52. Gadbaw, *supra* note 25, at 5.

53. Benko, *supra* note 17, at 26; Report of the Task Force on Intellectual Property, Advisory Committee for Trade Negotiations, U.S. Trade Representative, at 3 (Oct. 1985) [hereinafter "ACTN Report"].

54. WIPO, an arm of the United Nations, administers the 12 agreements established under the Paris Convention, formed in 1883. The Paris Convention governs intellectual property in its broadest sense including patents, trademarks, service marks, industrial design and inventions. WIPO also administers the Berne Convention, formed in 1886, which protects literary and artistic works. The Universal Copyright Convention, formed in 1952, also governs copyrights, but is considered less stringent than the Berne Convention. Benko, *supra* note 17, at 4-7; ACTN Report, *supra* note 53, at 2.

55. Benko, *supra* note 17, at 30, 33.

56. *Supra* notes 41 to 51 and accompanying text (contrasting views of industrialized and selected developing countries on protection of intellectual property rights).

57. Lamb, *supra* note 1, at 8.

58. ACTN Report, *supra* note 53, at 11; Benko, *supra* note 17, at 6-7, 33.

59. Benko, *supra* note 17, at 6-7.

60. *Id.* at 33.

61. Conversation with John Redpath, Home Box Office.

62. Benko, *supra* note 17, at 12. The authority of the secretary of commerce to issue interim orders of protection under the SCPA (which has been delegated to the commissioner of patents and trademarks) has been extended until July 1, 1991 by the SCPA of 1988, Public Law Number 100-159.

63. G. Hoffman and G. Marcou, "Congress Attacks Foreign 'Piracy' of Country's Intellectual Property," *National Law Journal*, March 14, 1988 at 19.

64. Recent Canadian legislation imposes fines of up to $1 million and five years in prison for commercial piracy of film, records and computer software.

65. Countries put on the U.S.T.R.'s second-level "Watch List" in May 1989 were: Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Philippines, Portugal, Spain, Turkey, Venezuela and Yugoslavia. These countries were "not as close to being designated as a priority country as those on the Priority Watch List," the U.S.T.R. explained.

66. Gadbaw, *supra* note 25, at 23.

67. *Id.* at 27. The RIAA is reportedly coordinating its efforts with foreign recording industry groups in an attempt to persuade the foreign governments to adopt stricter copyright protection. *Inside the White House*, July 7, 1988 at 7.

68. Gadbaw, *supra* note 25, at 29.

69. *Id.* at 21-22.

70. *Id.* at 38.

71. *Id.* at 55-63.

72. *Id.* at 63.

73. Conversation with Ronald J. Palenski, Computer Software and Services Industry Association (ADAPSO).

74. Lamb, *supra* note 1, at 13.

75. Letter from Stephen D'Onofrio, Recording Industry Association of America, July 28, 1989.

76. For example, IBM recently negotiated royalty payments from Taiwanese clone manufacturers. J. McGregor, "IBM Uses Clout to Force Taiwan Cloners to Cough Up Royalties on its PC Patents," *Wall Street Journal*, Sept. 7, 1988 at 30.

77. N. Holloway, 'Asia's Copyright Infringers Come Under Attack, Pirates Repelled," *Far Eastern Economic Review*, April 24, 1986 at 59 (describing RIAA sting operation which resulted in 1985 arrest of an Indonesian audiocassette pirate).

78. After lobbying by the Video Software Dealers Association and the National Association of Record Merchandisers, Virginia and California have enacted laws penalizing pirates for unfair packaging and consumer deception. Placing a misleading name or address on a record, cassette or compact disc was made a felony, carrying a maximum penalty of a $250,000 fine and/or five years in jail. The first person indicted under the new California law pleaded guilty and was sentenced to one year in prison. Under the previous California law, the sentence would have been one month.

79. Courts also have given tougher sentences for audio piracy under the federal sentencing guidelines and new state laws, according to RIAA. In the first four months of 1989, audio pirate manufacturers and distributors received sentences of up to one year in jail, fines of $5,000 and restitution. Raids of reputed illegal cassette manufacturing operations resulted in felony charges against 13 individuals.

80. Informal comments by panel participants.

81. Informal comments of William P. Nix, Motion Picture Export Association of America.